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AMERICAN BAR ASSOCIATION JOURNAL

July 1947

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NO. 7

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CALVERT MAGRUDER

Senior Circuit Judge
First Circuit



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In This Issue

The Continuity and the Trusteeship of the Supreme Court

1

Before the American Law Institute in Washington, Mr. Justice Burton spoke most interestingly of the Supreme Court and its place in our federal republic. He emphasized the compactness of its jurisdiction, the many aspects of its continuity as an institution, and the trusteeship which its members feel and exercise as to the liberties and rights of all the people. He gave many significant facts, figures and comparisons, little known to members of the Bar in general.

Lawyers and Judges in the Movies, Press and Radio

2

There has been a great deal of concern in our profession as to the manner in which judges, lawyers, courtroom scenes, and the law, are at times depicted on the screen, in the press, and on the radio. There has been still greater concern as to the treatment given to crime and criminals, and the attractive surroundings in which they are portrayed, because of what are believed to be the effects on the very young, as contributing to juvenile delinquency. One of the most interesting Conferences ever conducted by our Association dealt with these subjects. "Top" representatives of the motion picture industry, the newspapers, and the radio, told their side of the story, in a forthright manner which should lead members of our profession to do some thinking and take some action. Anyhow, you will find lively reading in the report of this Conference held on June 3.

The Lawyers' Skills in Agency Trials

3

Judge E. Barrett Prettyman makes a plea for craftsmanship and skill in the trial of cases before administrative agencies, and offers from his experience some practical suggestions of "do" and "don't", for lawyers for private clients and those for agencies. This is an article which no lawyer should fail to read with care.

Organized Bar Urges the Jennings Bill (H. R. 1639)

4

Our Association, as well as State and local Bar Associations, has been studying the abuses arising under the venue provisions of the federal Employers' Liability Act. Injustice is done to lawyers in many communities through the practice of transporting solicited claims to large cities to find a favorable forum for suit. Before the Judiciary Committee of the House of Representatives, Thomas B. Gay, of Virginia, spoke for our Association and the organized Bar in urging early enactment of remedial legislation (H. R. 1639).

The Girouard Case and the Obligations of Citizenship

5

Summing up the discussion which has taken place in our columns since February, as to the *Girouard* decision of the Supreme Court concerning the admission of aliens to citizenship where the applicant says that he will not bear arms in defense of this country, our present article states the points of agreement and the issue, and renews our recommendation that the Congress re-examine the matter and make clear its intent and policy.

Young Lawyer-Veteran Wins Ross Essay Prize

6

The 1947 Ross Essay Award—and the \$2500 check—goes to William Tucker Dean, Jr., of the Junior Bar, lately of the Army, who wrote while he was Assistant Professor of Law at the University of Kansas. The distinguished committee of award gave "honorable mention" to Schuyler Wood Jackson, Reporter of the Kansas Supreme Court, who has resigned to become Professor of Law at Washburn College (Topeka).

Precedents and Prefaces: Elizabeth to Blackstone

7

In the field of legal research and scholarship Frank E. Holman, of Washington State, has delved into the earliest history of the reporting of the decisions of British judges. He has found and brought together many "human interest" items which our readers will enjoy.

Senior Circuit Judge Calvert Magruder of the First

8

Our cover portrait and sketch this month are of one of the younger men among the Senior Circuit Judges—the versatile and industrious Calvert Magruder, with his gift for writing opinions that are forceful and clear.

Further Improving the Legislative Branch of Government

9

Walter P. Armstrong reviews for us the specific proposals made in *A Twentieth Century Congress*, by Congressman Estes Kefauver and Jack Levin—perhaps the most significant book published during June, when public attention and interest were so largely centered on the Congress.

(Continued on page V)

1947 ANNUAL MEETING • CLEVELAND, OHIO

September 22-26, 1947

The Seventieth Annual Meeting of the American Bar Association will be held at Cleveland, Ohio, September 22 to 26, 1947. Further information with respect to the meeting will be published in the *Journal* from time to time.

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(Continued from page III)

Proposed Repeal of Obsolete Federal Laws 10

Chairman Alexander Wiley of the Senate Committee on the Judiciary proposes to repeal hundreds of obsolete laws and parts of laws. His ambitious program is under way. He may succeed where others have failed. He also seeks the early codification of federal statutes. In both projects he asks and expects the help of our Association.

World Government, Politics and International Law 11

A third view of the above matters, differing from that of Samuel J. Kornhauser and Professor Ranney in our June issue (pages 563 and 567) is ably offered by Herbert W. Briggs, Professor of International Law at Cornell University. His rejoinder to the thesis that "there is no such thing as international law" and his exposition of the role of law in the present-day world will especially interest our readers. Meanwhile, the attitude of our Association thus far on these matters, as voted by the House of Delegates, is as stated in our June issue (page 568).

Observation on Changes in the Practice of Law 12

In aid of our effort to find out, and to place before our readers, what lawyers in the smaller cities and towns of America think about the present and future of our profession, Louis F. Jordan, of Waynesboro, Virginia, has written a vivid account of the changes as he sees them. Many of our readers may disagree with some things he says; the JOURNAL is trying to help get and give realities from which our profession can be surveyed and appraised.

No Open Competition for Hearing Examiner Posts? 13

We report the development as to the selection of Hearing Examiners

under the Administrative Procedure Act. Will they be chosen for fitness and impartiality? Or will present Examiners be "covered in"?

Books for Lawyers 14

Reviewed in This Issue

A feature is a critique of Professor Corwin's *Total War and the Constitution*, by Judge Orie L. Phillips, Senior Judge of the U. S. Circuit Court of Appeals for the Tenth Circuit. Dean Leflar of the University of Arkansas reviews Jerome Hall's *Principles of Criminal Law*, and Reginald H. Smith epitomizes *Why They Behave Like Russians*.

Preliminary Program for 1947 Annual Meeting in Cleveland 16

An outline program for our Association's sessions in Cleveland, Ohio, on September 22-26 is in this issue. Every member should make his plans now if he can.

American Law Institute Plans for New Work 17

Members of our profession will find many matters of interest to them in our account of the annual meeting of the Law Institute. The organization finds itself surveying new fields of work while completing its projects under way. Some of the matters reported should be noted by our readers as a part of information they may find useful.

Is There "No Such Thing as International Law"? 23

The Chairman of the Association's Committee and the Editor-in-Charge of our department on The Development of International Law give their answers to this recurring question, which is of vital import to members of the profession of law. They suggest that the negative answer, by the Soviet Union and by some in America, is due to tactics, or to definitions in aid of tactics, because there is an international law.

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The Supreme Court:

Mr. Justice Burton Gives Interesting Comparisons

■ Stressing the compactness of the jurisdiction of the Supreme Court, its many-sided continuity, and its trusteeship for all the people in assuring to our republican form of constitutional self-government the needed flexibility and stability, Associate Justice Harold H. Burton gave to the members of the American Law Institute on June 6 many significant facts and comparisons, in relation to the Court as the characteristic institution of the American judicial system. His observations as to the continuity of the Court, its membership, its officers, and its Bar, were particularly impressive.

■ At the request of the Chief Justice of the United States I bring you his greetings and those of the Court over which he presides.

As the Junior Justice of that Court I bring you an especially personal expression of appreciation of the work which this Institute, under the leadership of Director Lewis, has been doing for so many years and still is doing.

On stepping from the Bar to the bench I have become more keenly aware of that indebtedness. More than ever it is obvious to me that the practising lawyer necessarily directs his line of thinking from a principle to a specific case, whereas the bench must, if possible, make sure that its application of a principle to a specific case also fits in with the application of that principle at large. It

is in that connection that I find the Institute's Restatement of the Common Law to be of such value to our profession.

The symmetry which it lends to the law is as essential to the law as symmetry is to a building in the profession of architecture. The stability of the law depends upon that symmetry, and I want to express my appreciation of the contribution which the Institute has made to it.

I may say personally that as recently as a few days ago I had occasion to use, in an opinion, three sentences from the Restatement. I was glad to find the thought not only so well expressed but under such good auspices.

Appreciation of the Work of the Institute and Director Lewis

I want to express further appreciation of the fundamental concept of this Institute, which originated, I believe, largely with Mr. Lewis, and has been developed under his guidance for many years. In our courtroom, as many of you know, we have before us, cut in stone, high on the walls, representations of eighteen great contributors to the law; and I believe that the Institute, through Mr. Lewis, merits a place with them.

On the south side of the courtroom we have as the law givers of the pre-Christian era: Menes, of Egypt; Hammurabi, of Babylon; Moses and Solomon, of the Jews; Lycurgus, of Sparta; Solon, of Athens; Draco, of

Attica; Confucius of China; and Octavian, of Rome.

On the north side, to remind us further that the law of today did not start with the Common Law, we have Justinian, of Rome; Mohammed, of the Moslems; Charlemagne of the Franks; St. Louis, of France; King John, of England; Grotius, of the Netherlands; Blackstone, with his Commentaries on the Common Law; our own John Marshall; and Napoleon, to represent the Napoleonic Code.

Now we may add William Draper Lewis as a modern interpreter and clarifier of the law. [Applause] I am glad to say, however, that we have him here in person rather than in the frieze.

The Compactness and Finality of the Court's Jurisdiction

I bring you also a word as to some of the impressions that have come to me since I joined our Supreme Court about two years ago. I have been especially impressed with the compactness of the Court's jurisdiction, with the continuity of its service and the trusteeship which it helps to exercise.

The Court has a final but extremely limited jurisdiction. Starting with the provision in the Constitution that says that the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may

from time to time ordain and establish, that "one Supreme Court", in the cryptic language of the Constitution, probably means that there shall be but one Court sitting as such and that it cannot act finally through separate divisions. We thus have this one Supreme Court, and its entire jurisdiction is included in one paragraph, or for that matter in one sentence, of the Constitution.

To put it concretely, I will recall our jurisdiction to you: The judicial power of the United States extends to all cases, in Law and Equity, arising under the Constitution, the laws of the United States and treaties made, or which shall be made, under their authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all cases of admiralty and maritime jurisdiction;—

There the listing of subject-matter stops, but in addition to those cases we have the controversies based on the parties to them. Those are the controversies to which the United States shall be a party, controversies between two or more States, between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects.

That covers the maximum jurisdiction of the Court. In practice it is limited still further by the limits placed by the Constitution on our "original" jurisdiction which reduces it to almost nothing, and by the limits which Congress has placed upon the scope of our all-important appellate jurisdiction.

The result of this is a Court which should have the time and capacity to discharge adequately the responsibilities placed upon it.

Aside from this impression of compactness, there has come to me an appreciation of the remarkable continuity of the Court. Many laymen and some members of the Bar do not quite appreciate this unique relationship of our Court to our Government. In its continuity of service our Court is quite unlike the legisla-

tive and Executive branches of the federal Government.

The people of the United States have now their 80th Congress. Each Congress, technically, is separate from all the preceding Congresses. Each Congress starts afresh at the beginning of its two years of life. The bills of the preceding Congresses are dead. Each Congress organizes itself, elects its officers, and the members present bills to it as to a new body.

The Executive branch is somewhat similar in this respect. Each four-year administration is a separate administration. It is technically so, even though the same President may continue in office from one administration to the next. It is obviously so when there is a change in the personnel of the Presidency. The people of the United States today are served by their 40th administration.

The Supreme Court As a Continuing Institution

The Supreme Court, however, is different. The Justices who sit on the Court today are serving on the same Court that sat in 1790. If the first members of the Court had lived long enough and maintained their capacity for judicial work, they still would be on the Court. If the first cases filed with the Court had not been disposed of they still would be on our docket. We have, therefore, the same Court that started with this Nation. It has been a continuing Court from that day to this.

We see another demonstration of this continuity when we recognize the term of service that goes with appointment to the Court. Our Nation now has its 33rd President of the United States; but, our Court now has its 13th Chief Justice of the United States. You know these Chief Justices well. They range from John Jay, to John Rutledge, to Oliver Ellsworth, to John Marshall, to Roger B. Taney, to Salmon P. Chase, to Morrison R. Waite, to Melville W. Fuller, to Edward D. White, to William Howard Taft, to Charles Evans Hughes, to Harlan F. Stone and to Fred M. Vinson.

Continuity as to Reporters, Clerks and Marshals

During the life of the Court we have had but twelve Reporters. The Bar knows the first seven, because lawyers cite their cases from Dallas, Cranch, or Wheaton, from Peters, Howard, Black or Wallace.

When, however, we get beyond those first ninety volumes, and we look for the decisions made since about 1874, we find that the reporting for the last two hundred and forty volumes has been done almost wholly by four men. Today we have a fifth, capable but unheralded man serving as the Reporter of the Supreme Court. The four who preceded him were Otto, Davis, Butler, and Knaebel. The present Reporter is Wyatt. These twelve men cover the entire reporting of the decisions of this Court from its earliest days.

The continuity is especially obvious—and I may say the Court is grateful for the effect of it—in the Clerk's office. There we have a continuity that represents the service of ten men from the beginning of the Court to the present time. I do not go back now to the earliest days, but picking up the record at the time of the Civil War, we have had but five Clerks since 1863. They are Middleton, McKenney, Maher, Stansbury and Cropley. Those five men, with their able assistants, have covered the 84 years from the middle of the Civil War to the present time.

Each of the Clerks whom I have named not only served a long time as Clerk, but before he became Clerk served a long time in the Clerk's office in order that he might amply qualify himself to become Clerk.

You have there an asset in continuity, competency and stability that is of major importance to our Supreme Court Bar.

The Marshal's office presents a similar record. The Court had no separate Marshal until 1867. It then had its first Marshal of its own. He was Colonel Richard C. Parsons, who resigned when elected to Congress from the State of Ohio. He was followed by John G. Nicolay. He in turn gave up the Marshalship to

devote his entire time to the famous Nicolay and Hay biography of Lincoln.

Then came Wright and Green and today our Marshal is Thomas E. Waggaman, who also has grown up with the Court.

The Service of Seven Men Spans the Life of the Court

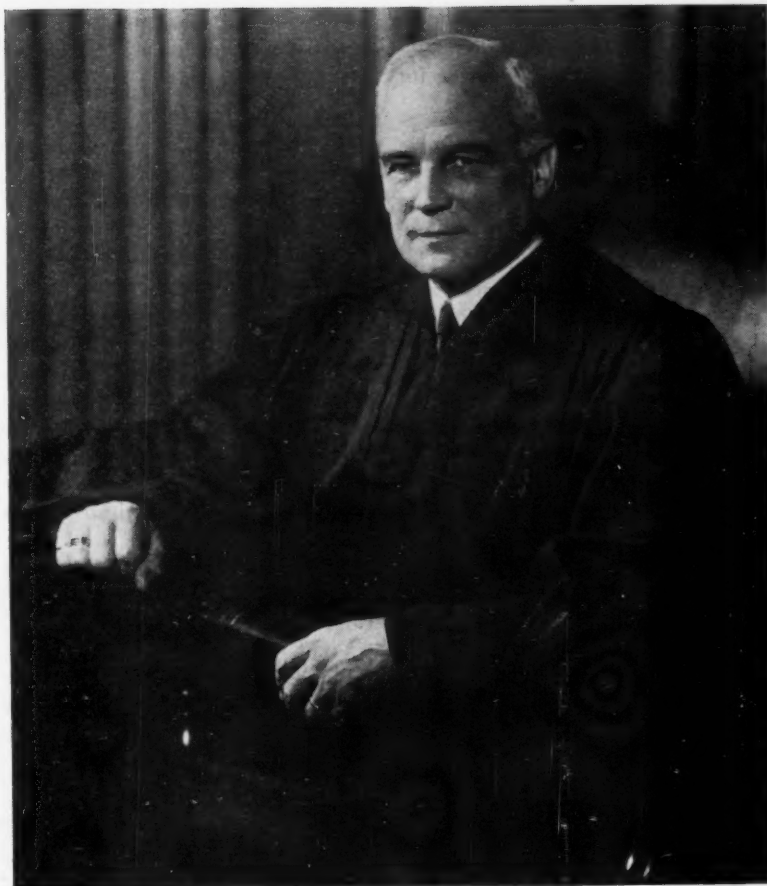
Another way to catch a glimpse of the continuity of service on the Court itself is to realize that: If anyone had visited the Court at any time since its first session and had found the full Court present, he would have seen sitting on the Bench at least one of seven men. One of the original Court Members was Mr. Justice Cushing, of Massachusetts. Before he left the Court, Chief Justice Marshall had been on it for some time, and was of course presiding. Before he left, Mr. Justice Wayne was on the Court; before he left, Mr. Justice Field was on the Court; and before Mr. Justice Field had completed his record term of service, Mr. Justice White had come to the Court. Before he left the Court, Mr. Justice McReynolds had joined it. Before Mr. Justice McReynolds had left it, our present Senior Justice, Mr. Justice Black, and four other members of our present Court had joined it.

Therefore, within the range of service of seven men the entire life of the Court is covered.

Continuity and Contribution of the Bar of the Court

Perhaps even more striking is a situation suggested by an incident which occurred not long ago in our courtroom. A distinguished member of this Institute came before the Court to argue a case. He suggested to the Court the interesting fact that it was almost fifty-four years since he had argued his first case at the Bar of our Court. It is a privilege to have him here, too, as the President of this Institute, and I may add that he won his case. [Applause]

But what I wish to emphasize is that fifty-four years of service at the Bar of the Court suggest a continuity that exceeds the continuity of service on the Bench. If there were but three



HAROLD H. BURTON

Senator George Wharton Peppers, their service would span the whole life of the Court. [Applause]

I pause to pay a further tribute to the Bar as such. The work of the Court reflects the work of the Bar. I am deeply indebted, as are all members of the Court, to the contribution which the Bar makes to the decisions of our Court.

Ten Periods with No Change for Five or More Years

Approaching the continuity of service on the Court from the angle of the Court as a unit, there have been ten periods when the Court had no change on it whatever, for substantially five or more years. There was one period when it went nearly twelve years without a single change of membership. That was from the early days of the first term of Madison to the late days of the second term of Monroe. Such con-

tinuity lends that added degree of stability to the decisions of the Court that comes naturally through a group that has worked together so long.

On the other hand, there has been a spreading of the vacancies on the Court so that every President of the United States who has served four years in the Presidency has appointed someone to the Court. The only Presidents who have not appointed someone to it have been William Henry Harrison, who served only a few months, Zachary Taylor, who served less than four years, and Andrew Johnson, who of course served less than four years and really bypassed himself by signing a law which said, in substance, that the Court, then consisting of ten members, should not receive additional members until the number had been reduced below seven including the Chief Justice—and that its number should remain at seven. The num-

ber did not go below eight while he was President, and soon thereafter the law was changed to provide for nine.

The Continuity of the Service of Individual Justices

That brings us to the continuity of the service of the individual members of the Court. Their service averages about fifteen years each. The longest service, of nearly thirty-five years, was that of Mr. Justice Stephen J. Field, of California. His record is nearly equalled by that of Chief Justice Marshall. The shortest term of actual total service on the Court was that of Mr. Justice Byrnes, who resigned to accept a wartime post with the federal government at the urgent request of The President. He served less than two years on the Court, and is the only member who has seen active service on the Court and served less than two years as a member of it.

The Value of Continuity to the Work of the Court

I come now to a phase of the continuity that I have had an opportunity to observe personally. It was a privilege for me to serve on the Court during my first term of Court with the late Chief Justice of the United States, Harlan Fiske Stone. He was then serving his twenty-first year. In him I saw the reflection that comes to the Court from the continuity of service of its senior members.

It was an illustration of what Mr. Chief Justice Hughes told me soon after I joined the Court. He said to me in substance: "I will never forget the first three years I spent catching up with that Court. As you go on the Court, every line of decision with which you come into contact is one in which you have not participated. When you have been there three, five, ten, fifteen or more years, each line of decision that comes before you is more and more likely to be one that you have helped to develop."

Through Chief Justice Stone, as the senior member of the Court, we had the benefit of a perspective that took us far back over the course

of development of nearly every issue that came before us.

"The Most Junior Court Since This Country Was Ten Years Old"

With the death of Chief Justice Stone, the seniority record of the Court dropped, until today it is the most junior Court that this country has had since the country was ten years old. During more than two-thirds of the life of the Court its Senior Member has had twenty years or more of service on the Court itself. During the remainder of the life of the Court, since the Court was thirteen years old, its Senior Member, until now, always has had thirteen or more years of service, although less than twenty years.

At present our Senior Member is completing his tenth year on the Court; and the Court, as I have said, is, therefore, in a sense, the most junior Court we have had since the Court was ten years old. There is no way to overcome this except by staying there. [Laughter]

The Total Membership of the Court Less Than That of Present Senate

Finally, the membership on the Court itself, from its first day to the present day, is smaller than of the United States Senate in office today. There have been but eighty-five members who have seen active service on the Court. Today nine are on the Bench, and the other seventy-six are in the books. We work each day with the seventy-six as well as with the nine. The continuity of this Court, thus brought to bear upon us, adds inspiration to our work. It helps to give our Nation the stability it always needs.

Our Public Officers Are Trustees for All the People

The final impression I wish to leave with you is that of a trusteeship. Our Nation has survived more than one hundred and fifty years to the surprise of much of the Old World. No such experiment had been tried in this form before. Many people in our own Nation feared that the plan would fail. But for more than one hundred and fifty years our Nation has continued to live and grow un-

der its unique Constitution; and I believe that one of the most important factors in bringing this about has been the fact that our written Constitution, in effect, makes our public officials trustees. They are trustees not merely for themselves, their party and their friends. They must be trustees for all the people, all the time.

Our Executives and legislators are required to govern for the benefit of everyone, including their opponents.

Freedom of Speech and the Press Preserves This Trusteeship

A principal feature of our Bill of Rights that preserves this trusteeship is the guaranty of the freedom of the press and of freedom of speech. This creates an obligation to foster even one's opposition, knowing full well that through such fostering of it, the opposition, ultimately will outvote the incumbents. On the other hand, the outvoted incumbents know equally well that in due time, they, in turn, will be able to bring about a similar change of control if they are given their constitutional freedom to do so.

Long Life Is Given to Our Form of Self-Government

Because of this feature in the structure of our Government it is neither lawful nor necessary for our officials to exile or "liquidate" their opponents. Our Constitution fosters the rights of minorities equally with those of majorities, with the result that without revolution, without murder, we have a flexibility under our Constitution and under our Bill of Rights that gives long life to our form of constitutional self-government. That Constitution, with its Bill of Rights, is, in turn, just as strong as it is interpreted to be by the Supreme Court of the United States.

All of this lends to the work of our Court a particular inspiration at this time. It is a privilege to share in the needed demonstration that our self-governing constitutional republic can meet successfully the issues of modern times.

[The assemblage arose and applauded.]

Movies, Press and Radio:

Conference Conducted by Our Association

■ On June 4 in Washington our Association convened, under the auspices of its Section of Criminal Law, a significant and promising conference with leading representatives of the motion-picture, newspaper, and radio broadcasting industries, concerning two principal problems of common interest and concern to those industries and to members of the profession of law:

(1) The extent and manner of the portrayal of crimes of cunning and violence, the attractive settings and surroundings in which criminals are shown as living, the meticulous accuracy of detail with which the commission of crimes is depicted, the extent to which the impression is left on the minds of the very young that "crime does pay" or is worth the risk—all as factors in the basic problem as to whether such portrayals on the screen and radio, and to some extent in some newspapers, cause or contribute to juvenile delinquency to an extent which can be avoided or lessened by cooperative measures; and

(2) As a secondary problem, the extent to which judges and lawyers, prosecuting officials and Courts, and the processes of the law and court-room trials, are at times unfavorably portrayed or in a sense caricatured, with the result that the standing of lawyers and the prestige of law and the Courts are unfavorably affected, so as to warrant an open-minded and remedial re-examination of the subject by the industries and the profession.

The conference was friendly, factual, very frank—hence necessarily "off the record" and not to be reported in the usual detail. Spokesmen for the motion-picture producers, the radio broadcasters, and the newspapers, gave the representatives of our Association vigorous and candid statements of the facts as they believed them to be, along with some pointed comments that lawyers, judges, and the public should "put their own houses in order", too, in specified respects.

We are able to publish a typical factual statement by the Motion Picture Producers Association as to motion pictures produced in 1946 for 1947, as to what they portrayed as to judges, lawyers, court room scenes, etc. This will give our readers some new angles on the problems. In fact, the conference was all very helpful, evidently for all concerned; and the outcome was the creation of a joint committee to confer further and to consider if anything remedial can and should be undertaken.

■ The conference on June 4 was called to order by President Carl B. Rix, who opened the subject and called on Arthur J. Freund, Chairman of the Section of Criminal Law, to state informally the two matters on which the Association sought an opportunity for discussion. President Rix and Chairman Freund jointly

presided over the session.

"Top" representatives of the industries concerned, headed by such men as Donald M. Nelson, formerly head of the WPB, now Vice Chairman of the Motion Picture Producers' Association, former Judge Justin Miller, a former Chairman of the Section, now President of the Na-

tional Radio Broadcasters' Association, Elisha M. Hanson, General Council for the American Newspaper Publishers' Association, and Theodore Smith, of the Motion Picture Producers' Association, gave earnest factual statements which threw much light on the practical problems. With the one exception hereinafter given, these cannot be reported here to the extent of being ascribed to the persons who uttered them; but these summaries or random excerpts from statements made in the discussions may also illustrate the significance of what was said:

Lawyers and judges are not alone in feeling that they are at times unfavorably represented, even caricatured; members of other professions and callings express at times the same feeling.

Care should be (and is) taken by the industries that the law, the Courts, and lawyers, should not be discredited or lose prestige, by reason of the portrayals given; the high standing of the professions is important to the industries and the public.

Civilization has changed; the breakdown in the discipline exercised by the family, the home, the church, the schools, the community standards, contribute far more to juvenile delinquency than do the radio, screen, and press; we have substituted for the jungle the highway, the roadside "juke-box" resort, the night club.

Until crime and participation in it are pictured as sordid, abhorrent and unprofitable, too many of our very young folks will think it is glamorous to imitate the meticulous details given on the screen and radio.

Over the years, the new impacts are chosen as the whipping-boy; it used to be the cigarette, the automobile, liquor; now it is the radio and screen. Radio, screen and press have to give the picture and tell the story as our

modern life makes it; the core of drama and interest is conflict or strife between opposing personalities or purposes.

Leading lawyers do not know what goes on in courtrooms; I have never seen anything as bad in screen courtroom scenes as I have in the real ones; judges do violate Canons of Judicial Ethics; lawyers do not get rid of their shysters; judges and lawyers better "ride herd" on their own unsavory members.

People love caricature; lawyers do it to themselves at Bar Association meetings, far worse than ever goes on a screen; people enjoy seeing "big shots" "shown up" and "pulled down".

Charles Dickens and Shakespeare, Victor Hugo and Gilbert and Sullivan, did not destroy the legal profession or the Courts by lampooning and unfavorably depicting judges, lawyers, and the law; they have been getting along better ever since.

We do a poor job, in our schools and colleges, in telling and teaching young people what law is and how Courts and government work. No subject is more poorly taught than the administration of justice; teachers are not educated for it, but merely assigned to it.

An all-important thing is to keep all media such as the movies, newspapers and radio out of control by government's administrative agencies; some people would like to undermine and discredit the media so the government could take them over.

Government control of the media does not and would not improve the media and more than government control of lawyers would improve the profession. Motion pictures cannot always be judged merely by the script; the script may be all right, but the acting may be derisive or tend to caricature.

After the lively exchange of views instanced by the foregoing, it was

voted as the sense of the meeting that a joint committee could well be created, for further conference and the consideration of possible suggestions.

Conferees for our Association included, in addition to President Rix and Chairman Freund: William Clarke Mason, Loyd Wright, A. W. Dobyns, Mitchell Long, and others of the Board of Governors; Chairman Howard L. Barkdull, of the House of Delegates; Chairman George M. Morris of the Committee on Public Relations; William L. Ransom, Editor-in-Chief of the JOURNAL; and James V. Bennett, Federal Superintendent of Prisons, Secretary of the Section. The factual statement by Theodore Smith as to motion pictures of 1946 follows:

A Factual Study of Judges, Lawyers, etc., in Motion Picture of 1946

I—INTRODUCTION

■ Stimulated by a question from a member of your Bar Association, a study has recently been completed on the portrayal of lawyers and important Courtroom personnel by the Motion Picture Association of America, Inc., of which Eric Johnston is President. Mr. Johnston, himself a lawyer, and his associates charged with the administration of the Motion Picture Association's Production Code, have indicated both by correspondence and by the study herewith presented that they are much interested in, and constantly aware of, the problem of a fair and just characterization of all professions.

Before proceeding to the results obtained in the study, it may be well to comment briefly on one or two basic elements historically present in virtually all theatrical entertainment. If we exclude such entertainment as vaudeville acts and sleight-of-hand, it is unexceptionably true that the core of all drama is conflict or strife in some form. This was as true in the days of Sophocles and Aeschylus as it is today. On the boards

of the legitimate theatre for 2500 years and on the motion picture screen for barely fifty, countless millions in audiences have seen human beings in conflict against one another, against nature, against ruthless fate, or in inner battle against themselves. Their struggles may end happily, they may end tragically or they may be completely farcical; but struggle is the spinal column of the theatre. That being true, it necessarily follows that some of these individuals come in conflict with organized society and thus with law. It is this last point which apparently has directed the attention of some members of the legal profession toward the treatment in contemporary motion pictures of persons concerned with legal affairs and the administration of justice.

From time to time, various groups object to one of their number being characterized unsympathetically. In fact, it has been observed somewhat humorously "that if all these objections were given full effect, the villain in motion pictures would have to be a native white American, without a college education or profes-

sional status, who belongs to no fraternal, political, religious or social organization, and who is unemployed." The presentation on stage or screen of such "oblong blurs" as the foregoing describes, is on the face of it preposterous. Characters in films and plays have to be individuals, and they have to do something. Nevertheless, any dignified professional group can with perfect validity object to an unfair and inaccurate presentation of themselves. Thus, should the medical profession be generally represented as selfish and unscrupulous, a strong protest from that group would certainly be justified, and should be respected.

There is one important condition, however, which should precede the entry of such a protest: The facts should support it.

One of the requisite supporting facts in the case of a protest involving the characterization of lawyers and Courtroom personnel should be solid evidence that either a majority, or a large proportion, of such people are unfavorably or "unsympathetically" depicted. It is inevitable, in the very nature of things,

that occasionally a judge, a district attorney, or a lawyer, should appear on the stage or screen in something less than the noble ethical atmosphere in which all professions are theoretically wrapped. It is so in real life, and it is therefore the truth. But to characterize a member of any profession in an unfavorable light is not to indict that profession as a whole. Good and bad members of all professions can be found, and yet no one feels an entire profession is discredited simply because some individual deviates from an ethical ideal or a well-known norm.

The motion picture industry has no desire by excessive unfavorable characterization to discredit any profession. Nor does it. In its recognition of the almost self-evident truths just discussed, it exercises extreme care, day in and day out, to see that professional groups are fairly treated on the screen. How this care is exercised, so far as the legal profession specifically is concerned, is described herewith on the basis of a study made of the portrayals of judges, district attorneys, lawyers and Courtroom scenes, in motion pictures reviewed by the Production Code Administration throughout the year of 1946.

The Production Code Administration is a branch of the Motion Picture Association of America, Inc. It is the PCA's specific task to administer the Motion Picture Production Code, and through it to exclude from the screens of this country objectionable subject-matter. The facts and figures which follow, present the results of a careful investigation as regards the treatment of one special group, the legal profession.

II—PERTINENT SECTIONS OF THE PRODUCTION CODE

The Production Code (adopted by the M.P.A.A. in 1930) provides that "Law, natural or human, shall not be ridiculed, nor shall sympathy be created for its violation." In the "Reasons Supporting the General Principles" of the Code appears the following comment with regard to the above section:

By natural law is understood the law which is written in the hearts of

all mankind, the great underlying principles of right and justice dictated by conscience.

By human law is understood the law written by civilized Nations.

1. The presentation of crimes against the law is often necessary for the carrying out of the plot. But the presentation must not throw sympathy with the crime as against the law nor with the criminal as against those who punish him.

2. The Courts of the land should not be presented as unjust. This does not mean that a single Court may not be represented as unjust, much less that a single Court official must not be presented this way. But the Court system of the country must not suffer as a result of this presentation.

The Annotations of the Production Code, prepared in 1937-38, carry the following general statement of policy under the title "Professions":

All of the professions should be presented fairly in motion pictures.

There should be no dialogue or scenes indicating that all, or a majority of the members of any professional group, are unethical, immoral, given to criminal activities, and the like.

Where a given member of any profession is to be a heavy or unsympathetic character, this should be off-set by showing upright members of the same profession condemning the unethical acts or conduct of the heavy or unsympathetic character.

Where a member of any profession is guilty of criminal conduct, there should be proper legal punishment for such criminal conduct—such punishment to be shown or indicated clearly.

A cross reference in the annotations re "Lawyers" contains the following specific application of the above mentioned statement of policy:

So long as stories are written, and plays and motion pictures produced, there will always be a considerable number which will deal with lawyers and Courtroom scenes. The reason for this is that drama deals with "conflict," and there is much dramatic conflict present in the practice of the law, since lawyers are involved where issues and problems have arisen which need legal interpretation or solution.

Sometimes dishonest, or shyster, lawyers appear in plays or motion pictures just as they exist in everyday life. Where dishonest or unethical, lawyers appear in pictures, there should be shown also ethical and high

principled lawyers who off-set the other type, and who condemn them. The lawyer who commits criminal acts should be punished properly for his misdeeds which are shown clearly to be wrong.

III—OVER-ALL STATISTICAL SUMMARY

During 1946, 425 feature pictures were approved by the PCA, a board of twelve men, of whom two are lawyers, charged with the responsibility of administering the Code. This board issues approximately 300 opinions a month regarding the suitability under the Code of story summaries, scripts, script revisions, and completed films. If a completed film upon official review is found to conform to the Production Code, a Certificate of Approval is issued and its number and the seal of the Association are placed on the main title of the film.

In addition to dealing specifically with the application of Code provisions to story theme and detailed treatment, the PCA includes in its opinions numerous suggestions of an advisory nature bearing upon possible reactions of various segments of the public, including professional groups.

Included in the feature pictures approved by the PCA in 1946, were 22 pictures in which 24 lawyers appeared in major roles, and 80 in which 80 lawyers appeared in minor roles, or a total of 104 lawyer roles. There were 57 pictures in which 60 judges were portrayed, of whom 53 were minor parts, and seven major. Twenty-three district attorneys appeared in as many pictures, with 15 of them in minor roles and the remainder in prominent roles. In addition, there were 35 pictures in which Courtroom scenes occurred. It is thus true that the legal profession, percentagewise, figured prominently in 1946 production.

IV—DETAILED ANALYSIS OF CHARACTERIZATION

A—Characterization of Lawyers

As stated above, in 77 feature-length pictures approved in 1946, there were 104 lawyers depicted. Of these 24 were major roles, 80 were minor,

and of the total of 104 roles, 65 were played "sympathetically", 21 were "indifferent", and only 18 were portrayed "unsympathetically". Of the 80 minor roles, 75 were played "straight", and five comic. Of the 18 unsympathetic characterizations, nine only were major roles, and of these nine, four were in "Westerns". (Note: The term "Western" is too well known to require definition, but it should be pointed out that these are essentially escapist, blood-and-thunder adventure pictures, taken seriously by virtually no one, and containing comparatively unimportant social commentary.)

More detailed comment on each of the pictures in which lawyers in major roles were presented unsympathetically, follows. As indicated above, there were nine such pictures:

In *Below the Deadline* the character Brennan is a disbarred lawyer, disbarred before the picture opens. At the conclusion of the picture this character, whose previous disbarment reflects credit on the legal profession, is in the hands of the police.

In *Pursued*, a "Western" laid in 1898, in a primitive frontier community, the "heavy", or villain is very vaguely indicated as a lawyer, and his status in this respect is, in addition to being far from precise, also dramatically quite unimportant.

In *The Cat Creeps* the villain is a lawyer, and is brought to justice. It should be noted, however, that he is apprehended by the local district attorney, and his characterization is thus to a considerable degree compensated by the latter's sympathetic portrayal.

In *Lady Chaser*, a melodrama-murder mystery, the villain is a lawyer who at the picture's end is revealed as a murderer. In this picture, incidentally, a Courtroom scene is handled with complete dignity.

In *Back Lash* there is one lawyer cast in a major, unsympathetic role, but he is compensated for by a resourceful district attorney, and in addition by another lawyer sympathetically depicted.

In *'Neath Canadian Skies* the prin-

cipal villain is a lawyer. This picture, however, like three others of the nine in which there were prominent unsympathetic lawyer parts, is a "Western", the social significance of which is therefore at a minimum, if, in fact, it can be said to have any at all.

In *Smooth as Silk*, a melodrama-murder story, a lawyer is the villain. It should be noted, however, that there were two other lawyers in this picture, both of them in minor roles to be sure, but emphatically sympathetic characterizations.

In *Unexpected Guest* and *Tumbleweed Trail*, both "Westerns," two of the villains are lawyers who fraudulently attempt to get control of ranches. The lawyer in *Unexpected Guest* is killed by a double-crossing associate, while the lawyer in *Tumbleweed Trail* is brought to justice by a United States marshal.

It can thus be accurately stated that if we exclude the "Westerns," which appears reasonable, out of the more than 400 feature pictures reviewed in 1946, there were only five unsympathetic lawyers in major roles.

A similar examination of the pictures in which lawyers were portrayed sympathetically in major roles further disposes of the allegation that the legal profession fares badly in American films.

In *Dangerous Business*, for example, one finds that the hero is a struggling young lawyer whose efforts succeed in saving a corporation president, who has been unjustly convicted of embezzlement.

In *The Perfect Marriage*, a social comedy, we find a most engaging lawyer counselling the two leads against divorce. He is clearly upset by the baseless nature of the quarrel involved, and his wisdom is borne out by the eventual happy solution of the domestic snarl.

Of some interest to members of the Bar was the characterization of the young lawyer in *I'll Be Yours*, a romantic musical-comedy. George Prescott, the hero, is a very high-principled young attorney who is portrayed in a fashion sufficiently idealistic to please anyone.

Of a special interest to attorneys engaged in the practice of criminal law is the picture *Criminal Court*. In this film the dominating character is an able, resourceful, and conscientious criminal lawyer. It would be presumptuous on anyone's part to attempt to measure accurately the impact of any one picture on the theatre-going public, but it can scarcely be doubted that the residual effect of this characterization can be anything but good. Throughout the picture one's sympathies are with Barnes as a person, as a lawyer, and furthermore as a lawyer bent on serving justice. It might be added that in the Courtroom scene in which the picture culminates, the district attorney who opposes Barnes is also represented in a dignified and creditable fashion.

The above pictures—and they do not exhaust the list in which sympathetic lawyers have major roles—would appear to far outweigh the five major unsympathetic parts discussed above. If one adds to these the very large number of sympathetic minor roles, one has a total net effect of predominantly favorable comment on lawyers as a group.

B—Characterization of Judges

During the year under review, there were 57 feature length pictures approved in which a judge or judges appeared, for a total of 60 such roles. Of these, 46 were sympathetic characterizations, none were comic, 12 were indifferent, and only two were unsympathetic—and only one of these two was a prominent part. In fact there were only seven characterizations of judges which were prominent roles. The one judge in a prominent role, portrayed unsympathetically, appeared in a "Western," but in that relatively insignificant production the character involved is a renegade ex-judge, explicitly indicated as such.

C—Characterization of District Attorneys

The characterization of district attorneys, like that of judges, may well be considered of particular significance, since there is obviously con-

siderable possibility that their appearance will be involved in some treatment of Courtroom procedure. With that in mind, the following analysis of such roles in the year under examination is not without some interest and import:

There were eight district attorneys appearing in major roles, and 15 in minor roles in 1946. Of the latter, 13 were portrayed sympathetically, two indifferently, and none unsympathetically. Of the former, district attorneys in major roles, motion picture audiences could have seen eight in films approved by the PCA, and of these eight, seven were portrayed sympathetically. Thus, out of a total of 23 district attorneys who appeared in as many pictures, one only was represented as an unsavory person.

It is hard to imagine anyone attending the picture *Mr. District Attorney* and not leaving impressed by, and completely admiring, the district attorney Craig Warren, a hard working and hard hitting servant of the people. In all respects Warren is a credit to the legal profession generally and to his status as a servant of the State. Not only would it be impossible reasonably to object to his characterization in this picture, but it is clear that the impression created by him on the minds of any theatre audience would be excellent and enduring. In *Don't Gamble with Strangers*, a crime-action feature, the hero is a young assistant district attorney, a thoroughly sympathetic and engaging character, who helps to break up a gambling ring and to bring to account the

rather unpleasant persons involved in it.

To cite only two more pictures, it is perhaps fair to suggest that the characterization of the neurotic district attorney in *The Strange Love of Martha Ivers* was far outweighed by the characterization of the district attorney in *Boomerang*, concerning which Archer Winsten, motion picture critic of the *New York Post*, said on March 6, 1947:

But that is not its chief claim to greatness. That is embodied in its glorification of a lawyer's integrity. This is a quality too often lacking in various walks of American life. . . . Negative censorship can cut a million feet of celluloid to ribbons without achieving the tiniest fraction of this picture's honestly up-lifting effect.

Those who saw *Boomerang* will recall that the figure who was the inspiration for the district attorney pictured so dramatically and sympathetically in that picture later became Attorney General Cummings of the United States.

V—TREATMENT OF COURTROOM SCENES

In 1946, there were 35 feature length pictures in which Courtroom scenes occurred. All but three of these scenes were handled in an entirely dignified and creditable fashion, while three were comic.

In one of these, *Singin' in the Corn*, a farce-comedy of "Western" type, the Court is presided over by a judge who is played indifferently, but with dignity. His role is completely minor. The minor part of the judge is played sympathetically in

the second picture, *The Ghost Goes Wild*, a farce-comedy, although the humorous situation in Court brings the Courtroom sequence under the designation of "comic".

VI—TYPICAL QUOTATIONS FROM PCA OPINIONS CONCERNING PICTURES REVIEWED IN 1946, IN WHICH MEMBERS OF THE LEGAL PROFESSION APPEARED

After two members of the PCA have studied a script for a contemplated feature picture, possible code violations and important policy questions are discussed in the regular daily conference of the board, after which the board member designated prepares an advisory opinion addressed to the producer, in which deletions or changes required under specific code provisions are listed, precautionary warnings are voiced, and suggestions with regard to policy matters are advanced for the guidance of the producer. These early opinions are described as "advisory" because the final opinion is rendered only after a review of the finished picture.

The following quotations from typical opinions written concerning pictures reviewed in 1946, will illustrate the care with which the PCA seeks to contribute to a proper characterization of legal personalities and to accurate handling of Court procedure.

#11492 (January 10, 1946):

"We suggest that you consult with your legal department as to the technical accuracy of the Courtroom scenes."

(Continued on page 740)

Judge Orie L. Phillips Is Chairman of Council for Survey of Contemporary Legal Profession

■ The Council which will conduct independently the Survey of the Contemporary Legal Profession in America has unanimously elected as its Chairman Judge Orie L. Phillips, of Denver, Colorado, and New Mexico,

Senior Circuit Judge of the United States Circuit Court of Appeals for the Tenth Circuit. Dean J. H. Harno, of the University of Illinois Law School is the Secretary of the Council, and Arthur T. Vanderbilt of New Jersey is the Director of the

Survey (See our May issue, page 423-425).

Judge Phillips' acceptance of this post of leadership ensures a factual and objective survey of the profession under the auspices of the representative Council.

Trial of Agency Cases: The Need for Craftsmanship and Fairness

by E. Barrett Prettyman • of the Court of Appeals for the District of Columbia

■ Characterizing administrative law as "the problem child" of present-day justice, Judge Prettyman pointed out in an informal address before the Section of Administrative Law of the District of Columbia Bar Association several ways in which the lawyers for the administrative agencies and for private clients can and should do much to make the agency system work fairly and acceptably. Indeed, the great value of his remedial discussion comes from his very practical suggestions for craftsmanship and skill in the trial of agency cases; for scrupulous care on the part of agency members, examiners, and counsel that trial shall be and seem fair and that the findings shall be according to the evidence; and for less aversion on the part of the agencies toward judicial scrutiny of their decisions. The Section of Administrative Law of the District Bar Association was formed during Judge Prettyman's administration as President of the Association, while he was at the Bar; and the great majority of those present were personal friends and legal adversaries of many years standing, who had prevailed on him to make this informal presentation. His suggestion that the profession of law should consider some means of training lawyers to try cases—akin to an internship or apprenticeship—gives food for thought.

Every lawyer who has occasion to take part in a contested proceeding before an agency, federal or State, will find practical assistance in the advice given by Judge Prettyman from his long and distinguished experience in private practice, in work for agencies, and on the bench of the Court which is a principal tribunal for such judicial review of agency rulings as is permitted under present statutes and decisions.

■ We are in the midst, perhaps in the precise crisis, of the development of a great field of law. It is not too great exaggeration to say that the development of administrative law is akin to the development of equity in importance. That development poses problems.

Let us state some premises. The administrative agencies are essential features of a government designed and equipped to govern a complex economic society. They are therefore permanent. So it is idle to rebel against them or to protest their existence. The administrative practitioner should be the last of all humans to complain at the fact of administrative agencies. His concern

should be for the perfecting of the system and hence its more certain perpetuation and expansion.

We do have vital problems. Some of them are procedural. Too many people in the administrative field say that merely procedural matters are of little importance. They are wholly wrong. Many things which our people hold most precious are procedural. Due process of law is one. Trial by jury is another. A search warrant is another. Ceremonies are merely procedural, but some of them, such as taking an oath of office, or getting married, are pretty important.

A major part of the public appraisal of government activity is

based on procedural considerations. If a judge proceeds with care and deliberation, in calm order, people generally trust him. When stress comes they support him. If a judge is impatient, disorderly, uncertain, people generally do not believe in him as a judge, even if his answers on substantive matters are right. Curtis Bok, in his *I Too, Nicodemus*, says that impatient judges ought to be impeached. It is true in all phases of life. If the clerks in a store are discourteous, people do not trade there except for the most compelling reasons. The goods in a shop must be superlative in quality and almost unobtainable elsewhere to attract customers in the face of discourtesy on the part of management and salesmen.

Of course, I am not minimizing the vital value of substantive policy, program and rulings. But we can put it down as a certainty that if an administrative agency is defective in its adjective aspects, or if it appears to be so, it is headed for public condemnation. Joe Doaks comes before the agency for something and gets pushed around, or forms a low opinion of the proceeding itself, and he is just as mad as he is about an adverse decision, and usually he is much more vociferous about it. He proceeds to tell all and sundry about what strikes him as not fair. If an umpire "calls 'em quick and as he sees 'em," Joe may yell and gripe, but in his heart, and when things get rough, he supports that umpire. But if the umpire delays and is generally inefficient in reaching a decision, Joe

has no use for him whatever, no matter if his decision is right.

Craftsmanship As Lawyers Is Needed

I shall not attempt a list of our problems and shall mention only three. The first is our professional craftsmanship as lawyers. By craftsmanship I mean the ability to write pleadings and briefs, to examine witnesses, to cross-examine them, and to introduce testimony. The fact is that our profession as a whole is woefully deficient in craftsmanship. We pay little or no attention to it, either in our processes of education or in our practice. I would not over-emphasize practice courses to the detriment of substantive law; but I do think that we ought to teach law students not only how to write a will or a contract, but how to write one well. We teach them all the psychological principles underlying judicial proof, but we ought also to teach them how to ask questions, directly, succinctly, and accurately.

Hundreds of lawyers are trying cases upon the general theory that anybody can try a lawsuit. The result is that we take weeks to try issues when a few hours would readily suffice. Justice often miscarries in such process. There is something to be said for the British system of barristers. Francis Wellman says that an experienced trial lawyer will require at the utmost not more than a quarter of the time taken by the most learned inexperienced lawyer, and moreover will be more likely to bring about an equitable verdict which may not be appealed from at all, or, if appealed, will be sustained by a higher Court. It is true.

Other professions pay great attention to craftsmanship. Doctors have to undergo long internships before they are turned loose on the public. Preachers have to preach sample sermons in the course of their education. Engineers do not let a graduate fresh out of school go to building bridges and structures without senior supervision, and the tests of their ability are practical tests. I truly believe that if we as lawyers learned how to do

most efficiently the things we do, whether it is to write a contract, construct a bond issue, draw a will, examine a witness, write a brief, or make an argument, the administration of justice would achieve a major advance in this country—perhaps even the critical advance necessary to the preservation of our system.

Lack of Craftsmanship Mars Agency Trials

We here are not interested in Court trials. But the lack of craftsmanship, so generally prevalent in our profession, is a characteristic of our administrative proceedings. And in those proceedings the need of skillful trial technique is even more acute than in the courtroom. In the first place, the matters being handled are vastly more complicated than ordinary lawsuits. Hence a mixup is worse, and the truth is harder to find. In the second place, the administrative agency is promoted as an instrument of efficiency, and if it be not efficient, public criticism comes quickly. When we as lawyers, by lack of technical skill, so delay disposition of disputed cases as to prevent efficient operation, we are threatening injury to the system we ought on all accounts to be protecting. And when I say "we lawyers", I mean attorneys in both Government and private practice. In the third place, the ordinary rules, such as the rules of evidence, or pleading and the like, which, whatever else is said about them, certainly tend to keep a semblance of order, are relaxed. The skill of counsel becomes one of the chief preventives of chaos.

Details of Defective Trial Craftsmanship

May we be a little more specific and consider separately the phases of our procedure in disputed cases? They are the presentation of direct evidence, cross-examination, a brief and an argument. The results of defective craftsmanship in these matters are days and weeks of wasted time, volumes upon volumes of records, dollars and dollars of expense, and total uncertainty as to the outcome.

The difficulty in the presentation



E. BARRETT PRETTYMAN

of direct evidence comes in major part in the lack of preparation in the mechanics of the hearing. I sat once in an administrative proceeding in which a young lawyer introduced over 200 photostats of individual letters, one at a time by individual identification by a witness over a period of days, after opposing counsel had offered to stipulate the identification of the whole batch in a blanket stipulation. The young lawyer said that he chose to try his case in his own way and would appreciate no suggestions. On the other hand, I once looked with joy at a record where counsel said to a witness: "You have prepared a study upon such-and-such a subject in relation to this company? Did you incorporate a narrative statement explaining the computations? Do you adopt the statement and the computations as your sworn testimony? Is this it? I offer this exhibit. Take the witness." Copies of the study had long before been furnished opposing counsel, and cross-examination could have proceeded at once and directly at the controverted items in accordance with a well and carefully designed cross-examination with a purpose. It is quite a chore to prepare adequately the presentation of direct testimony, but we ought to be required to do it. It is amazing how quickly and how accurately a skillful examiner can draw a word-picture from a witness, even of a complicated subject.

More Skillful Presentation of Evidence Will Help

I know that lawyers are trained to believe that questions and answers on one small topic at a time constitute the only method of proceeding in a formal hearing. I suggest to you that that may not be so in administrative hearings. We are not before a jury or before a trial judge who must decide the case largely upon what he hears and has not the time to analyze great masses of evidence or to wait for such analyses. The examiner or board or commission does not make findings from what he or it hears. The findings are drawn from the formal written record. Our proceedings have three essentials: First, all the evidence placed in a formal record; second, full opportunity to dispute items of evidence by cross-examination or by contradictory evidence; and, third, an analysis and summary of the evidence, either in the form of proposed findings or in the form of a statement of facts, so that the formal evidence is accurately directed at the issues in dispute. Our object is not to convince a listener, or to mold a decision instantaneously. Our object is to convince a reader and to shape a decision which will be fashioned from a stenographic record and documentary exhibits in an unhurried analysis and assembly. Our administrative hearings differ from the usual Court proceedings in these important characteristics. We ought to discard the mechanical limitations of the one and design an efficient system of mechanics for our type of proceeding. An administrative proceeding offers no prizes for histrionics; it is the building of a wall, brick by brick.

One respect in which our presentation of evidence is particularly deficient is our handling of voluminous statistical data. We have it in exhibit form, and then we spend hours and days having a witness read long figures into the stenographic record from the exhibit. I do not know the best way to do it, but I do know that a well-prepared exhibit, plus a narrative guide, either oral or written, showing how to find one's way

through the exhibit, is a completely sufficient method. I also know that the way we generally do it now is an outrageous waste of time, and money and the very antithesis of efficiency. And I also know that if we tried we could devise a method for handling such evidence efficiently and sensibly. The critical feature of statistical data is the summary linking it to the issues. Most of the bulk of it is superfluous.

Better Methods of Proving Scientific Facts Are Needed

Another point at which our technique in the presentation of evidence is askew is in the proof of a scientific fact. We have many controversies over scientific facts in administrative proceedings—wave lengths, car safety, electric energy, rate at which ice melts at certain temperatures, and innumerable others. Our method of proof is for one side to employ an expert and have him answer questions. Then the other side employs an expert who testifies to the precise contrary of the first expert. And the same process repeats. The examiner, or the commission, then does the best he or it can to figure the truth from the direct contradictions.

It does seem that in an age of complicated scientific facts, with plenty of learned folk who know accurately and fully what there is to know about these facts, the legal profession ought to be able to devise some technique of proof which would insure that decisions of disputed cases involving scientific facts or theories are upon an accurate basis.

Cross-Examination As a Neglected Art

Although we are deficient in our craftsmanship on direct examination, we are much more so on cross. A cross-examination without plan or objective is not only useless but is a positive impediment to the administration of justice. All of us have known so-called cross-examinations to go on for days and weeks when, as a matter of fact, nothing was occurring except an argument, more or less acrimonious, between witness and counsel. The practice is so gen-

eral as to be in my opinion a major problem. It exists both in Government circles and at the private Bar. I teach my class at Georgetown that the rule as to cross-examination of experts is "don't", that there are a few well-defined exceptions to that general rule, and that unless the situation falls within one of those exceptions, they should not indulge in cross. Perhaps the statement is too strong, but I believe it to be true.

The problem of cross-examination is particularly acute in administrative proceedings, because there we deal so much with experts in complicated fields. I have never known an expert to change his view because of a cross-examination. I have never heard of one doing so. And Mr. Wellman says one never does. A cross-examination may serve to throw into relief the weaknesses of his material, his knowledge or his reasoning, or it may supply the basis for impeachment of his credibility; but he will never change his mind on the witness stand. Nevertheless, the great majority of lawyers go into a cross-examination with the idea that they can argue or harass an expert into changing his answer. That is a complete waste of time.

Of course, before a jury, the passing impressions created by a great actor in cross-examining a witness may serve some useful purpose. But in the administrative practice, we are addressing ourselves to a cold, impersonal stenographic record, from which the examiner or board or commission will, in deliberate fashion at some later time, extract the facts. It is poor craftsmanship and a definite drag on the process of adjudication to indulge in cross-examination without a plan or definite purpose.

Craftsmanship Lacking in Briefs and Arguments

Just a word about craftsmanship in briefs and arguments. Every disputed case consists of issues. The agency or the Court must decide those issues; and when the issues are decided, the general result is automatic. Good craftsmanship on the part of counsel in brief or argument consists of defining with precision those issues,

assembling the evidence pertinent to each, and then stating a process of reasoning from the pertinent data to a conclusion.

Do you think that most of us follow that obvious procedure? We do not. Generally speaking, we write, or worse yet merely dictate, a discussion of the case, a general plea for justice or mercy, an allegation in vehement terms that our opponent is in error; and we top it off with a few selected sentences torn bodily from all context in some cases or textbooks.

We make statements of points, such as "The Court erred in failing to grant a new trial" or "The commission erred in finding a rate base of \$10,000,000" or "The findings are without substantial evidence in support." When we make this last point, do you think that, generally speaking, we lawyers assemble whatever evidence there was in support of a given finding, then state what necessary evidence was lacking, and then proceed in discernible thought processes to show that the evidence present was not substantial in the absence of that which was lacking? We do not. It is sad but nevertheless true that as a class we do not *argue* cases. That is, we do not start with a stated material and proceed in some ordered mental processes to a conclusion. We generally write and speak discussions of the subject, treatises, or just plain pleas.

Agency Findings Should Be Based Strictly on the Evidence

The second problem I submit to you as besetting the administrative practice is more difficult to state. Justice itself is substantive. But the administration of justice is procedural. Americans have a definite conviction upon that subject. It is not theoretical. It is composed of exceedingly simple, practical elements. The essentials of the American concept of the administration of justice are: (1) That opportunity be afforded to present evidence of the facts, (2) That the facts be found exactly as they actually are, to the best of our ability to ascertain them from the evidence, and (3) That the applicable

rules be applied, without deviation, to the facts as found. It is just as simple as that.

Much has been written and spoken to the general effect that administrative agencies, or some of them, do not comply scrupulously with those simple rules. It is said vigorously and repeatedly that some agencies find what facts they please, on the barest shadow of evidence, and reach whatever conclusion they have predetermined.

I have no word to say as to whether such allegations are or are not true. My proposition is that the administrative agencies must comply with those simple elements, and not only must they comply but it must be apparent to all who see their work that they comply. It is necessary for the existence of the agencies that they protect themselves, and that we, as practitioners before them, protect them from any reputation of being arbitrary. The course of any agency to the contrary is to the detriment of all agencies, and of us.

Law, Reason and Fairness Must Control

Torches can properly be carried in the process of fixing policies and programs, when substantive principles are being determined. Such principles can be debated in the abstract and tested upon reason, or theory, or experience. If an agency adopts erroneous principles or program, that is the concern of the whole of the Executive branch of the Government and of the Congress. But on the other phase of administrative agency work, that is, in the application of those principles to individuals, no torches can be carried. That is where the greatest danger lies. The process of dealing with the individual and his rights in a disputed matter must accord with the American concept of the administration of justice.

In the first place, our whole concept of law is that reason should control human conduct. Professor Thayer (3 *Harvard Law Review* 143; 4 *id.* 157) said it thus: "But as we use the phrase 'trial' . . . now, we mean a rational ascertainment of facts, and a

rational ascertainment and application of rules. What was formerly 'tried' by the method of force or the mechanical conformity to form, is now 'tried' by the method of reason." In the second place, our political concept as embodied in the Constitution is "due process of law". And by that phrase we mean a process in which facts are found as they are and rules are applied to the facts as thus found, with cold-blooded objectivity.

The Public Will Not Tolerate Agency Unfairness

The proposition I have put can be conclusively demonstrated on either of the two foregoing bases. But of still greater practical importance is the fact that the public will not permit the continued existence of any agency of government which in its estimation is not fair. That is just a simple political fact. I put it as a scientific certainty that when the people of this country become convinced that a given agency, or officer, is arbitrary, or unjust, or unfair, that agency or person is doomed. Congress will surely obliterate it. You can pick your own examples. Prohibition was perhaps the outstanding one. The people did not repeal the 18th Amendment because they wanted liquor back. They could have brought back such liquor as they needed by some controlled method. They wiped the whole business out because the enforcement of the law was so outrageous that gradually it became a scandal.

There are other instances where the substance of the law is uncontroverted in excellence but the methods of enforcement have led the people to destroy the whole business. You may think of examples where the conviction got abroad, however unjustly, that an agency did not find the facts as they really were, or was not wholly objective in applying the rules to the facts. Those instances stand as tragic warnings against the appearance or the reputation of arbitrary action. On the other hand are those agencies which have built up over the years reputations of cold-blooded objectivity in disputed cases,

and when the storms came and beat about their heads, the public came to their support. When that happened, hardly a corporal's guard was in the opposition when the issues were drawn.

Arbitrary Administrative Action Is Resented

You can hardly exaggerate the importance of a conviction on the part of the whole public that when a dispute is submitted to a given board or commission, no matter whether the parties be great or small, powerful or impotent, the facts are found exactly as the evidence shows them to be and the rules are applied to those facts with unvarying objectivity. The validity of policies and programs can be discussed and debated upon a high plane and with reason. They are political matters, or

matters of substantive law. But the public will have no part of arbitrary administrative action as it sees it. Its dealing in such instances is ruthless and oftentimes tragic.

And to comply with the requirements is such a simple matter. Over and over again we hear arguments and protestations about why a hearing was not granted. In twenty-five years of administrative law, inside and outside the Government, I assure you that I have never heard a good reason for not having a hearing in a dispute, and I have never known an instance in which any time was saved by not giving a hearing.

Public Approval of Agency Conduct Is Vital

The public mind is a strange instrument. The science of governmental

regulation and of law enforcement is a complicated and fascinating study. Many characteristics of public thought which are dramatic and maybe alarming, are superficial. For example, a mere gripe is not a real objection. And pressure groups are often infinitesimal in public influence. But there are certain fundamentals which are as invariable as scientific truths. People not only do not relish unfair treatment for themselves, but they resent it for their neighbor. And they not only resent such treatment *against* their neighbor, but they resent it in his favor. If an American learns of a favor unjustly bestowed upon another person, even one he does not know, he resents it in the same sort of way he resents an unjust imposition on another person.

(Continued on page 741)

Tribute to Memory of Washington



■ The Board of Governors of our Association left its work awhile on the afternoon of Monday, June 2, and went to Mt. Vernon, where President Carl B. Rix, in the name of the lawyers of America, paid the traditional tribute to the memory of George Washington by placing a wreath on the tomb of the Father of Our Country.

President Rix first read impressively George Washington's Prayer for His Countrymen, which may well be uttered by men and women in this time:

Almighty God, we make our earnest prayer that Thou wilt keep the United States in Thy holy protection, that Thou wilt incline the hearts of the citizens to cultivate a spirit of subordination and obedience to government; to entertain a brotherly affection and love for one another and for their fellow citizens of the United States at large. And finally that Thou wilt most graciously be pleased to dispose us all to do justice, to love mercy and to demean ourselves with that charity, humility and pacific temper of mind which were the characteristics of the Divine Author of our blessed religion, and without an humble imitation of whose example in these things we can never hope to be a happy nation. Grant our supplication, we beseech Thee, through Jesus Christ, our Lord, AMEN.

The members of the Board of Governors and their wives were received by the Superintendent of this National Shrine, which is owned and managed by a patriotic group of American women. The home and gardens were visited before the party returned to the Mayflower Hotel. Association Treasurer Walter M. Bastian, of the District of Columbia, arranged for the trip and simple ceremony.

Venue of Actions:

Bill to Curb "Shopping" for Forums Is Urged

■ Another instance of the militancy of our Association in behalf of the interests of the members of the profession as well as the public is afforded by the support being given to the Jennings Bill (H. R. 1639) to require that suits under the Federal Employers' Liability Act be brought and tried under most circumstances where the cause of action arose or where the claimant resided when the accident occurred. Injustice to many lawyers in local communities results, and the prompt and orderly administration of justice in the United States District Courts is seriously interfered with, by the practices which have sprung up under venue provisions inserted by the 1908 amendment of the Act (Section 6; 45 U. S. C. A. Sec. 56) further amended in 1910, 1911 and 1939. Unethical solicitation of claims and their transportation to particular jurisdictions believed to be favorable to such claims, were found by Committees of the Association to result.

At a hearing before Sub-committee No. 4 of the Committee on the Judiciary of the House of Representatives on April 18, Thomas B. Gay, President of The Virginia State Bar Association and Chairman of our Association's Committee on Jurisprudence and Law Reform, made an incisive statement of the reasons why the speedy enactment of the remedial Jennings Bill (H. R. 1639), endorsed in principle by the House of Delegates (32 A.B.A.J. 493; August, 1946), is urged by the organized Bar. Mr. Gay's argument for the bill will be of interest to our members. On June 19 the bill was reported favorably to the House, with amendments, and committed to the Committee of the whole. Those who have views as to the bill are urged to communicate promptly with their Senators and Members of Congress.

■ The Federal Employers' Liability Act, when it was originally passed in 1908, contained no specific venue provisions.¹ The second paragraph of the present Section 6 of the Act, added by amendment in 1910, permits suits to be brought, among other places, in the District Court of any State in which a railroad may be doing business. Concurrent jurisdiction and venue is conferred upon similar State Courts. This provision has permitted widespread transportation of claims under the Act to foreign jurisdictions and their solicitation and trial by unscrupulous lawyers, resulting in the violation of accepted ethical con-

cepts, reflection upon the high standards of the legal profession, undue burden upon the Courts of such jurisdictions, and great hardships and injustice to the railroads as defendants in such actions.

The traditional concepts of a fair trial require that it be held under most circumstances where the cause of action arose or where the claimant resided when the accident occurred. The pending bill will so amend Section 6 of the Act to provide a new system of venue for actions instituted under it in the federal or State Courts; its provisions have the sanction of the Courts.

Venue of actions under the Act

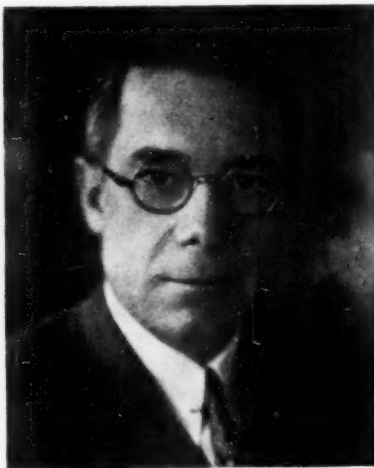
as first passed was left to the general venue statute (35 Statutes at Large, Sec. 65) which fixed the venue of suits in the United States Courts, based in whole or in part upon the Act, in the districts of which the defendant was an inhabitant.² As written the Act was construed by the Supreme Court to require that the defendant be sued in the State of its residence, or incorporation. This had the effect of requiring litigation to be instituted and conducted in most cases at a distance from where the plaintiff resided, and imposed great hardships upon claimants in many instances.

The present venue provisions were enacted in the amendment of 1910 for the purpose of preventing this inequity. It was passed for the purpose of avoiding, not encouraging, litigation at a distance. The record of the discussions on the floor of the Senate at the time of its adoption clearly shows this to be true, and demonstrates that in enacting that amendment the Congress did not intend to authorize or sanction the abuses which have grown up under, and found protection from, its provisions.

Claimants' Attorneys Are Permitted To "Shop" for a Favorable Forum

These abuses arise out of the provision in the existing law that the plaintiff may institute his action in the Courts of the United States of any Federal district "in which the

1. *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U. S. 44.
2. *Ibid.*



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defendant *shall be doing business* at the time of commencing such action." Concurrent jurisdiction is presently conferred upon the Courts of the several States. Since most railroads actually operate in many States and "do business" within the meaning of that term as used in the present law in many more, an employee who suffers injury in one State may sue upon it at a point in another State thousands of miles or more distant from where the accident occurred or where the employee resided at the time of the injury.

It is thus possible for an injured employee to go shopping for a judge or a jury believed to be more favorable than he would find in his home forum. It is obviously the advantage which it is hoped will be reflected in the amount of a foreign judgment which inspires the employee to incur the burden of expense and inconvenience that would be regarded as oppressive if forced upon him by legislative enactment.³ It is also possible for lawyers who are willing to do so thus to engage in the unethical and unscrupulous practice of solicitation and transportation of actions from the places of residence of claimants, or from places where causes of action may arise, to foreign jurisdictions.

Supreme Court Has Been Powerless To Prevent Misuse of Venue

For a time railroads undertook by the remedy of injunction to restrain

claimants from the prosecution of such causes of action in remote jurisdictions, on the principal ground of undue hardship on them in the defense of such actions; but, under the decisions in the *Miles* and *Kepner* cases, the Supreme Court has found itself powerless, even in the exercise of its equity jurisdiction, to interfere with a remedy expressly given a claimant under the present venue provisions of the Act.

Under H. R. 1639 this ground of the venue will be eliminated, *unless* the defendant cannot be served in the city, county or district in which the accident giving rise to the action occurred, or in which the employee suffering injury resided at that time. It is difficult to conceive of a situation in which the saving clause of this provision would apply. For all practical purposes, therefore, the bill if enacted will require suits to be brought where the accident occurred or where the injured employee resided at the time of the injury.

The organized Bar believes this to be a salutary limitation upon the rights of employees of railroads. The attitude of the Bar in this matter involves principles affecting a proper and orderly administration of justice.

Present Abuses Are Highly Unjust to Local Lawyers

Information now in hand discloses that relatively few of the thousands of lawyers in the United States have commercialized the possibilities of the venue provisions of the present law, to the point that suits or claims are constantly moving from small towns and rural centers to large centers of population such as New York, Chicago and St. Louis, for the purpose of settlements or for the institution of suits thereon when settlements cannot be had under threat of suit. I am informed that statistics furnished your Committee show, in part at least, the extent to which this practice has become established, a practice under which claimants may shop about in the several States for a forum believed to be more favorable than their own and under which unscrupulous lawyers may partici-

pate in the solicitation and transportation of litigation in an unethical and unprofessional manner. The claims upon which these numerous suits are brought in foreign jurisdictions are a small percentage of the total number of claims transported to such jurisdictions, which were settled before suits were brought.

But for the solicitation and transportation of these claims this vast amount of legal business would have been handled by local lawyers in the communities in which the claimants lived or in which the causes of action had their origin. This seems wholly unfair to local lawyers who laboriously prepare and qualify themselves to handle claims and litigation of this kind in the communities in which they strive to uphold the high traditions of an honorable profession, which has from time immemorial discouraged and condemned such unethical practices. As paradoxical as it may seem, perhaps the strongest ally on the side of those few unscrupulous members of the profession who are profiting at the expense of the great majority of the membership, is the insistence upon the maintenance of the high standard of ethics by that great majority, that admits of no competition with the unscrupulous members in such unethical practices.

A Claimed Justification for the Unwholesome Practice

Some, but not all, of the lawyers who are reaping the benefits of this unwholesome practice undertake to justify their conduct upon the ground that they are regularly retained counsel of a railroad Brotherhood of which the claimants as railroad employees are members, and that their employment in such matters comes through the organized activities of the Brotherhoods, without their active participation in the matter of solicitation. Be that as it may, these lawyers are nevertheless members of the legal profession, to the tenets and ideals of which they are pledged to abide. There is prob-

3. *Miles v. Illinois Central*, 315 U. S. 698; concurring opinion of Mr. Justice Jackson at page 706.

ably no Bar Association in America that does not condemn the practice that these Brotherhood lawyers would undertake to justify.

Canon 35 of the Canons of Professional Ethics of the American Bar Association may be regarded as typical of the attitude of the organized Bar toward the conduct of lawyers who accept employment in such cases through the activities of railroad Brotherhoods. That Canon provides in part:

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such organization in respect to their individual affairs.

Canons of Ethics and State Statutes Cannot Prevent Present Abuses

Perhaps all Bar organizations, whether voluntary or statutory, provide machinery and procedure for the protection of their membership against the solicitation of legal business. Legislatures in many of the States have made the solicitation of legal business a criminal offense. It is obvious, however, that a Committee on Ethics of a Bar Association, or even a prosecuting State officer charged with the duty of prosecuting persons for the violation of statutes prohibiting the solicitation of legal business, cannot effectively prevent lawyers in distant States from violating Codes of Ethics, or State statutes, designed to prevent the solicitation of such business.

Solicitation by the very nature of its practice is done in secret, and the solicitor is usually safely within his own jurisdiction before his actions are discovered. Therefore, as a practical matter, such Canons of Ethics of Bar Associations, or State statutes designed to prevent such solicitation, are totally inadequate to protect those affected by the evils of the solicitation of legal business.

If the solicitation and transportation of claims and lawsuits from one community to another, in a foreign jurisdiction, may be practised and

engaged in with impunity, within the authority of a federal law, and if such practice is not curbed in some effective manner, the legal profession (which justly enjoys public respect and private confidence largely because of the high ethical standards maintained by most of its members) will become so commercialized as to merit and justly receive public condemnation. It will for like reason suffer irreparable injury since it will cease to attract to its membership men and women of character and integrity who have heretofore contributed to the high professional position which it now occupies in any well-ordered society. If the legal profession is permitted to suffer in this manner, the effects upon it will ultimately reflect upon our whole judicial system.

Under our judicial systems, both federal and State, Courts are organized, from the standpoint of judicial and administrative personnel, with the view of efficiently and promptly handling legal business normally arising within their respective jurisdictions. Court machinery is not normally geared to handle and dispose of large influxes of litigation having its origin in foreign jurisdictions. It is perfectly apparent that if lawyers are permitted, under the broad venue provisions of the federal Act, to solicit and import claims from foreign jurisdictions and bring suits thereon in the Courts before which they customarily practise, such conduct can have no other result than unduly to burden dockets with foreign litigation and delay the disposition and trial of cases that properly originate in such local Courts. This is not only unfair to local lawyers and litigants, but imposes an unjustified expense on the State or District affected, to say nothing of the increased burden upon the judges and other Court officials.

Railroads Are Also Victims of Present Pernicious Practice

It is perhaps unnecessary to point out that railroads are also the victims of the pernicious practice of solicitation and transportation of claims and lawsuits arising under

the Employers' Liability Act. Every lawyer knows that the oral testimony of witnesses is essential to an adequate and understandable presentation of the facts on which such claims are based. Railroad operations, out of which the claims under consideration arise, cannot be made understandable to the average juror except by oral explanation, and frequently with the aid of maps, models, and sometimes an actual view, of the premises. Under the federal Act, a railroad is now without the power to compel the attendance of witnesses in Courts of foreign jurisdictions, whose oral testimony may be essential. Every lawyer knows that the trial of cases upon depositions of witnesses is highly unsatisfactory, because explanations cannot be made adequately understandable by witnesses testifying in this manner. Jurors are also denied the opportunity of viewing the witness while he is testifying, and are thus disabled to evaluate properly the credibility of his testimony. Even if a railroad may persuade a witness or witnesses voluntarily to put themselves to the trouble and inconvenience of attending Courts of foreign jurisdictions, it is obvious that the cost is excessive and burdensome.

It is also true that when a railroad is forced to try a case in a foreign jurisdiction, sometimes without the personal appearance of witnesses, the plaintiff frequently may take the defendant by surprise by offering testimony and making factual contentions which the defendant would have no reason to anticipate, and which cannot then be met, because of the inability seasonably to obtain the personal presence of witnesses, or of even taking their depositions. All this is to say nothing of the added expense to a railroad and the extended disruption of operations incident to the trial of an action several hundred and sometimes thousands of miles removed from the place of the accident.

A railroad, like any other citizen, has the right to determine the question whether it will voluntarily settle a claim. The railroad owes a duty

to its stockholders and to the public to decline to settle claims wholly without merit. If a claim, regardless of its merits, may be transported to a point thousands of miles from where the accident occurred, it is obvious from the above statement of circumstances and conditions under which railroads are required to try such cases, that they too often think it to their advantage to make unwarranted settlements rather than suffer the consequences of unfair trials, involving the possibility of unconscionable verdicts.

Supreme Court Has Recognized Evils of Transporting Litigation

What then is the solution of this problem? Some observations of the Supreme Court in similar situations seem to supply a correct answer. In *Michigan Central Railway Co. v. Mix*, 278 U.S. 492, the plaintiff sought to recover in Missouri for the fatal injury of her husband, which occurred in Michigan where they both resided at the time of the accident. She later moved to Missouri. The railroad company had never done any business in Missouri except to solicit freight and transportation in interstate commerce over its lines in other States. For this purpose it maintained an office in Missouri. In holding that it was not doing business in that State in such manner as to bring it within the venue provisions of the Federal Employers' Liability Act, the Supreme Court said:

Here, the plaintiff had become a resident in Missouri after the injury complained of, but before instituting the action. *For aught that appears her removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit; and because she was advised that her chances of recovery would be better there than they would be in Michigan.* The mere fact that she had acquired a residence within Missouri before commencing the action does not make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a State remote from that in which the accident occurred and in which both parties resided at the time. (page 495—Italics supplied.)

The Supreme Court thus recognized the evils of transporting litigation arising under the Act to foreign jurisdictions, and pointed out the reason for eliminating this ground of venue which would no longer exist if H. R. 1639 is adopted.

In dealing generally with the subject of venue in actions brought by shippers against interstate carriers, Mr. Justice Jackson in *Davis v. Farmers Cooperative Equity Co.*, 292 U.S. 312, said:

... Orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise . . . in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. (Italics supplied.)

The foregoing is an apt statement of the right concept of venue in actions arising under the Federal Employers' Liability Act. H. R. 1639 would enact it into law.

Precedent for the Venue Provisions of the Bill

There is precedent for the venue provisions proposed in the pending bill. During World War I, the then Director-General of Railroads promulgated an order limiting the right of the public to sue railroads only in the Courts of the county or district where the cause of action arose or where the plaintiff resided at the time it occurred. In the *Davis* case it was said in this connection:

That the claims against interstate carriers for personal injuries and for loss and damages of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative or advisable to leave the determination of their liability to the Courts; that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers,—these are matters of common knowledge. Facts of which we also take judicial notice indicate that the burden upon interstate carriers, imposed specifically by the statute here assailed, is a heavy one; and that the resulting obstruction to commerce must be serious. During Federal control absences of

employees incident to such litigation were found, by the Director-General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18A) which required suit to be brought in the county or district where the cause of action arose, or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama & V. R. Co. v. Journey*, 257 U.S. 111, 66 L. ed. 154, 42 Sup. Ct. Rep. 6. *The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war.* (page 316—Italics supplied.)

The Traditional Locality of Forum for Fair Trial

Why should a railroad employee enjoy any other or different right in the selection of a forum than the public generally? Why should a small group of unscrupulous lawyers be afforded statutory sanction to traffic in lawsuits and solicit and transport them for trial in jurisdictions far removed from the residence of the parties involved or the place where the cause of action arose? No valid reason has been or can be assigned why these things should be permitted to occur, and H. R. 1639, if enacted, will confine the employee's election to those places traditionally regarded as the forum for the assertion of common law rights.

One of the traditional guaranties of a fair trial under our Anglo-Saxon system of law has always been that the trial shall take place where the act complained of occurred, before a jury composed of the peers of the parties. It would seem both unusual and extraordinary if, as a general proposition, it will not be to the advantage of a claimant to try his case in his home county, city or State, or in his home federal district, or in the Court in the county, city or district where the accident occurred. H. R. 1639 meets these traditional concepts of venue, and provides the only choice of a forum which a railroad employee or his attorney should, in the interest of the parties and the orderly and economical administration of justice, be permitted to have in the enforcement of this right under the Federal Employers' Liability Act,

American Citizenship:

Intent of Congress as to Alien Applicants

■ After considering carefully Dean Earl G. Harrison's argument in our June issue (pages 540-543) as well as the numerous letters expressing varied points of view (see our April issue, pages 323-326), we have not changed the opinion expressed in our original discussion (February issue, page 95) that the Congress should without delay reexamine the decision of the Supreme Court in the *Girouard* case and declare again in unmistakable terms its intention as to the oath of allegiance to be taken by alien applicants for American citizenship and particularly as to attempted qualifications and limitations as to bearing arms if need be in the defense of our country.

If the Supreme Court, in overruling its previous decisions against admitting aliens who make such reservations, has given effect to the intent of the Congress in enacting the Nationality Act of 1940 and the prior statutes, the legislative bodies should say so. If the intent and public policy of the law-making branch of government are not reflected in the statute as it has now been re-interpreted by the Supreme Court, then measures such as H. R. 2286 (by Mr. Dolliver) or H. R. 2444 (by Mr. Gossett), now pending before the House Committee on the Judiciary, should be considered and passed. Such a law would reaffirm the legislative intent by expressly precluding the granting of citizenship to one who says he will not bear arms in defense of the United States or who in any such way qualifies or limits his oath of allegiance to our country. In any event, judges, lawyers and other citizens, who have views on the subject, should immediately make them known to their Senators and Congressmen and particularly to the members of the two Committees on the Judiciary.

■ The discussion which has taken place in our columns has been useful, and has developed general agreement upon certain fundamental principles. They were clearly stated in the first paragraph of the dissent in the *Macintosh* case, 283 U. S. 627, and have been recognized by those who have expressed in our symposium otherwise divergent views:

Naturalization is a privilege to be granted or withheld.

The Congress (not the Court) has

the power to fix the conditions on which the privilege is to be granted.

The Congress has the power to compel service in the Army in a time of war or to punish a refusal to serve.

The Congress has the authority to exact a promise to bear arms as a condition of its grant of naturalization.

In our discussion there has been agreement also that it was not neces-

sary, in the cases which came before the Court, to force the issue as to whether the alien would bear arms for his adopted country. The oath of allegiance could have been accepted as prescribed, without raising the question of limitation or reservation as to bearing arms. But when it was raised and since the Supreme Court has now reversed its earlier rulings and has now held that a naturalization Court cannot refuse to admit an alien applicant even though his refusal appears affirmatively, it seems to be imperative that the Congress, the acknowledged authority, shall give a clear and affirmative answer.

Significant Grounds of the Changed Decision

We find no need to reiterate matters covered in our first article (33 A.B. A.J. 95). There are a few points of variance that may well be summarized. The Holmes argument in the *Schwimmer* case was referred to in our original article (pages 96 and 98). Dean Harrison relies greatly on the Hughes opinion in the *Macintosh* case. But to us it seems that when Chief Justice Hughes conceded the power of the Congress to compel service in the Army, he thereby recognized that the exercise of that power could not be forestalled or abridged by an applicant for citizenship. If an applicant will not acknowledge that power and trust the

American Congress to exercise it wisely, with all due regard for his conscientious scruples, then ought he to be naturalized?

Again we call attention to the difference between the reasons assigned for the majority opinion in the *Girouard* case and those assigned in all the earlier cases. The former dissents were concerned for freedom of thought and conscience; they did not attempt to glamorize pacifism. True, Chief Justice Hughes said:

There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms.

But he did not try to reduce the soldier's supreme sacrifice to a parity with the performance of "duties far behind the fighting front".

The problem which pacifism raises becomes in last analysis a choice between two evils—the evil of war or the evil of submission. In the two world wars our Nation elected to fight rather than to submit to despotism. Men in overwhelming majorities have preferred war to the surrender of their liberties. Pacifism may be morally attractive but it is practically impossible. Mankind has never dared to adopt it, by and large, in this imperfect world.

Freedom of Conscience Is Preserved in America

So great is our regard for freedom of conscience, however, that we have uniformly exempted pacifists, native-born and naturalized, from active military operations. But we do not accept pacifism as a National policy, nor should we concede that the conscientious scruples and reservations of a pacifist transcend the power of the Congress to require universal military service, if it should become necessary in defense of our Nation.

The discussion which has taken place in our columns, like other current controversies, comes down to the issues between rights of the individual and rights of the State. Here as always we see that many individual rights or immunities are correlative, and are subordinate to the community interest in matters where the individual human rights would

otherwise be insecure or worthless. The true "liberal" is a champion of the common interest and tries to maintain the balance between basic individual rights and rights of government. One who overemphasizes the importance of the rights of the State supports what amounts to fascism or totalitarianism, under whatever guise or label, whereas one who overemphasizes the importance of individual rights to the extent of denying the power of society to protect the community and the individual invites only anarchy. True liberalism adheres to the golden mean and thus preserves all rights and their security.

It seems, however, that some men think the only way to be a "liberal" is always to stand for freedom, even when to do so amounts to a license to the individual to be recreant to the common weal. The very history and practice of our democracy may tend to overemphasize some concepts of what is called personal liberty. Americans must not forget that true liberty can be preserved and enjoyed only as the law vouchsafes and protects it and that the law lacks efficacy if the paramount public welfare has no power of enforcement. If we are to save our National community from division and disintegration within and defend it against aggression and infiltration from abroad, Americans need to maintain in their central government a sufficient power to assert the common will and preserve the security and order without which freedom and law cannot long exist. This emergent power cannot be permitted to be whittled away by the reservations attached by alien applicants to even their oath of fealty.

The pacifists and those who seek to create latitude and longitude for their concepts of National allegiance will hardly realize their dreams by subordinating the basic power of National defense to the qualms of individual conscience on the part of alien applicants for citizenship. Meanwhile, according to the sound tradition of our Association, its members will form and freely express their own opinions on such a subject,

rather than accept as such the opinions advanced by the JOURNAL or any of its contributions.

Meanwhile, another facet of the basic question as to the intent and policy of the Congress is illumined by a case pending at this writing before Judge Edward A. Conger, in what is said by plaintiff's attorneys to be "a test case", in the Southern District of New York. One Hans Ludwig Benzian was born in Germany. Taken by his father to Sweden, he became a Swedish citizen, but was returned to Germany at the age of six, for school. He went back to Sweden in 1938 and came to the United States in January of 1940.

Under the Selective Training and Service Act as enacted in September of 1940, Benzian, then 23 years old, was required to register, but as an alien was not subject to military service. Under the Act as amended after Pearl Harbor, he was subject to such service unless he claimed exemption as an alien. He made such a claim in November of 1943. In August of 1945, he asked the United States Immigration Service to determine if he is eligible for citizenship.

The ruling was that he was not eligible, on the ground that the Act was intended to bar forever from American citizenship an alien who claimed exemption from military service because he was an alien. So Benzian has gone to Court for a determination of his right to naturalization. His claim is that he was here only "temporarily" on permit as a neutral alien, because he intended to return to Sweden and was prevented by the Nazi invasion of Norway; that the Act construed by the Immigration Service should be held not to apply to him; and that the exemption claim which he signed to avoid military service is void as a bar to his being naturalized. The Government claims that the Act broadly required military service by all aliens who did not claim exemption, and that such a refusal to serve this country barred a later application for citizenship. Thus the *Girouard* decision opened a Pandora's box and did not settle the issues.

Ross Essay Prize:

William Tucker Dean, Jr., Wins 1947 Award

■ For the second year in succession, the Erskine M. Ross Essay Prize has been won by a young lawyer who saw service in World War II, although this time the winner was of the Army. The 1947 award was to William Tucker Dean, Jr., not yet 32 years old, who at the time he wrote his \$2500 essay was an Assistant Professor of Law at the University of Kansas, and will hold a like position at the New York University School of Law. He became a member of our Association in August, 1946. The victor in 1946 was Eugene C. Gerhart of Binghamton, New York, and the Junior Bar, who served in the Navy.

The State of Kansas shares the honors with the Junior Bar and the lawyer-veterans this year, as the committee of judges resolved its difficulties by giving "honorable mention" to Schuyler Wood Jackson, of Topeka, the Reporter for the Supreme Court of Kansas, member of our Association since 1944, who has lately resigned to become a Professor of Law at Washburn College (Topeka).

This year's subject for discussion in the contest for the honor and prize made possible by the testamentary benefaction of the late United States Circuit Judge Erskine M. Ross, of Los Angeles, was as follows: "How Can International Legislation Best Be Improved—By Multi-Partite Treas-



WILLIAM TUCKER DEAN, JR.



SCHUYLER WOOD JACKSON

ties, or by Giving Powers to the General Assembly of the United Nations?" The committee of judges who read the essays and made the selection unanimously ratified by the Board of Governors were: Circuit Judge Harvey M. Johnsen, of Kansas City, Chairman; Charles E. Dunbar, Jr., of New Orleans; and George A. Finch, of Washington, D.C. The winning essay will be published in our August number and Mr. Jackson's discussion in a later issue.

Dean was born in Chicago, August 31, 1915, and was graduated from Nicholas Senn High School in 1933. He obtained his A.B. degree *magna cum laude* in 1937, from Harvard, where he was elected to Phi Beta

Kappa. He was graduated from the University of Chicago Law School, with a J.D. degree, in 1940, and was admitted to the Bar of the District of Columbia and later in Kansas.

First he was an Assistant Attorney in the Bituminous Coal Division of the Department of Interior in 1940-1941; then an associate legal adviser of the Fuel Section of the OPA in 1941-1942. He attended the Harvard Business School in 1942-1943, and received the degree of IA (Industrial Administrator). He next entered the Officers' Candidate School, Transportation Corps, and was commissioned a 2nd Lieutenant in October of 1943.

Dean served as Control Officer at

the San Francisco Port of Embarkation until July of 1944, and then attended the School of Military Government at Charlottesville, Virginia, and was graduated in the summer of 1944. He was assigned as an Historical Officer overseas with the 96th Infantry Division, and served at Leyte, Philippine Islands, in 1944 to 1945, and was promoted to the rank of Captain while he was in the Pacific.

Upon his return from overseas Dean was assigned as Historical Officer, Historical Division, War Department Special Staff, and received a special letter of commendation for his work in that capacity. Upon his discharge from the Army he was appointed an Assistant Professor of Law, University of Kansas, and taught there for the school year 1946-1947. He is attending the Harvard

Graduate School of Business Administration this summer, to complete his work for the degree of M.B.A. (Master of Business Administration). He will go to the New York University School of Law in the fall.

In 1943 he was married to Miss Ann Coulson, daughter of Robert E. Coulson, of the New York Bar. They have two children. He has become a member of the Advisory Board of the JOURNAL, to increase the representation of the younger men and lawyer-veterans. Before he had won the Ross Prize, an article contributed by him to the *Journal of the Bar Association of the State of Kansas* had attracted attention and had been reviewed for this issue (page 731). The \$2500 prize and the Association's certificate will be bestowed at the Cleveland meeting

in September.

Schuyler Wood Jackson, who won "honorable mention", was born in Eureka, Kansas, in 1904. His father was a lawyer well known in the State, who was born in Stanton, practised law in Eureka and Topeka, was a member of Congress from the 4th Kansas District in 1911-13 and attorney for the Kansas Public Service Commission 1915-25, and died in 1931. Young Jackson was graduated from Washburn College in 1927 and Harvard Law School in 1930. After practising law in Topeka from 1931 to 1939, he became the law research clerk of the State Supreme Court in 1939 and its Reporter in 1942. Reflecting the drift in the profession to the teaching of law, he has resigned to take a professorship in Washburn College.

The Congress Should Watch and Correct the Interpretation of Statutes

■ In the New York *Times* Book Review Section for June 8, Morris L. Ernst, of the New York Bar, concluded his discussion of Wesley McCune's provocative *The Nine Young Men* (Harper & Brothers; May, 1947; reviewed in our June issue at page 595) with the following trenchant comment:

"This is an important book because, as one of the Justices of the present Supreme Court has stated: 'There is perhaps no area of news more inaccurately reported factually, on the whole, though with some notable exceptions, than legal news.'

And the news from that non-acoustical court room will become increasingly exciting because these judges will not stick their chins out by declaring Acts of Congress unconstitutional as did the Nine Old Men, but will exert equivalent power by what is called 'interpretation of statutes.' It is well to remember that interpretations of statutes by divided votes, defeating at times what seems to many to be the clear intention of Congress, are subject to correction by Congress itself.

"However, that unwieldy, negligent body seldom has kept an eye on

Supreme Court decisions, which so often have invited Congressional clarification or reform. It seems to me that in every case where the Court has split on a matter of important interpretation as to what Congress meant in a statute, some committee of the Congress should promptly meet to decide whether the legislators meant what the majority wrote or what the minority thought. Any such Congressional action can only stem from an interested public, and McCune's book is a real contribution in that direction."

Precedents and Prefaces:

Elizabeth to Blackstone

by Frank E. Holman • of the Washington State Bar (Seattle)

■ If you would turn away from the things which perplex and worry us as lawyers and citizens, Mr. Holman offers you the opportunity to get "the long look" as to the history of our profession and the earliest development of its "tools" now taken for granted. His research into the beginnings of the reporting of the decisions of British judges turns up many readable reminders that ours has been a profession of law and precedents of justice.

Mr. Holman practised law in Salt Lake City and Seattle, and was Dean of Law at the University of Utah, before he returned to Seattle to head his law firm. He has been President of the Washington State Bar, a member of our Association since 1922, active in the House of Delegates and the work of its Committees. In June he delivered the commencement address at his Alma Mater, the University of Utah, as a part of exercises commemorating the 100th anniversary of the arrival of the first settlers in his native State.

■ The lawyer of today has almost immediately at hand a full report of all cases decided by the various Courts of record. However, the modern system of law reporting is a development of the last century and, in its present completeness, largely a development of the last seventy-five years.

In a judicial system like that of England, where by far the largest part of the law is based upon the precedents of decided cases, it seems a little extraordinary that no official or authorized reporting of judicial decisions was developed until comparatively recent times.

King's Courts Established

The common law and many of its principles as conceived and an-

nounced by judicial decision date back to the time of Henry II (1154-1189). Most legal historians agree that the jury system and many of the still operative principles of common law date from Henry's reign. It was in this reign that the *Curia Regis*, the King's Court, in which only matters touching the King had theretofore been cognizable, became the King's Courts, in which the subjects themselves might litigate as between each other. It was Henry II who established judicial territorial divisions in the nature of Circuits and Assizes.

From then on, the King's Courts and their decisions were increasingly influenced by the decisions rendered in earlier cases or by precedent. In

other words, each succeeding case in the King's Courts was more and more governed, if not controlled, by what had been decided in some prior case or cases. Because of this, one would suppose that the lawyers themselves would have left, at least in manuscript form, something in the nature of reports of the decisions of the judges. There is some evidence, according to Maitland, of private reporting; but this seems to have been confined to the private use of individual practitioners. Certainly there was nothing in the nature of official reporting, and there is nothing extant of any private reports that might have existed at that time.

About 1188 we have Glanville's *Treatise*. This was not in any sense a record of decided cases, but was an attempt by a law writer to restate the laws and customs of England from 1066 to 1188 as he thought them to be. We know very little of the materials upon which Glanville based his work.

Appearance of the Year Books

About the end of the 13th century (Edward I, 1272-1307) there appeared a new kind of law book, the successors of which were to play a large part in the legal history and development of England. These were the *Year Books*. They never pur-

ported to be law reports, as such. They were for the most part by anonymous writers—perhaps by lawyers or lawyers' clerks—and often by different writers. It was not pretended that they were complete records of particular cases, but they constituted largely the discussions which took place in Court between judge and counsel at the time a cause was under consideration.

Hence they are not reports of the formal decisions, as such, but only reports of the colloquies as they developed in Court between the judges and the lawyers. They are of some considerable value as showing the development of legal conceptions, which were perhaps better displayed by the dialectic process than they would have been by a report of the formal pleadings or judgments. Though at the time of Edward I the pleadings were required to be in Latin, the *Year Books* were written in Law French.

The *Year Books* extend from Edward I (approximately 1300) to near the end of Henry VIII (approximately 1547). Then they ceased, as suggested by Professor Holdsworth, largely on account of the introduction of printing. The old *Year Books* were in manuscript form—a large part of them being still untranslated—but many were put into English by various printers in the early part of the 16th century, due to a considerable demand made by practising lawyers for printed editions. Subsequent reprints have appeared from time to time.

Beginning of Case Reporting

In the latter part of the 16th century, during the reign of Elizabeth (1558-1603), there began to appear another kind of law book, edited by lawyers, prothonotaries and others—some even by lawyers' clerks. These were designated as *Reports*, usually under the name of the particular author who was responsible for their publication, or rather, responsible for the manuscript reports of the cases upon which the printed editions were based. These unofficial reports attempted to set out the

Court's decision in each particular case, with the names of the parties litigant, the character of the action, at least a brief statement of the facts, and a résumé of the Court's decision. They are all unofficial publications, incomplete in the sense that no attempt was made to cover all cases decided, and incomplete also in that often the facts were obscurely stated and the judge's decision paraphrased.

Some cases so reported appear in more than one of these unofficial reports—even in three or four—and a comparison between the reports shows that while the effect of the Court's decision is substantially the same, the Court's decision is phrased differently in one report from what is put down in another. Prior to 1865 there were no official or authorized law reports in England—and only a few in this country.

Plowden and Coke

The first and greatest of these private reporters between the time of Elizabeth and of Blackstone was Plowden. He took occasion, however, to designate his publication as *The Commentaries or Reports of Edward Plowden of the Inner Temple, an Apprentice of the Common Law*. His work was substantially that of a commentator. His first edition appeared in 1571. He may be said to have been the Blackstone of Elizabeth's reign.

There is only one other writer or commentator between Plowden and Blackstone whose influence on English law is comparable to that of Blackstone. He is Sir Edward Coke, who wrote from 1600 to 1616. The gap of approximately 150 years between Coke and Blackstone is filled by one hundred or more unofficial reporters who produced and had printed, for the use of themselves and the profession, reports of various cases of their own selection. Many of these editions contain quaint and curious prefaces in excuse or in explanation of the author's publication. In fact some of these prefaces introducing the various volumes have more human interest than the legal precedents reported.



FRANK E. HOLMAN

Illustrative Cases and Prefaces

The writer has collected about thirty original editions of these unofficial reports. Some still have their original bindings; some have been rebound. From these original editions a few cases and prefaces which may interest the modern reader have been selected more or less at hazard.

One of the first of these reports is "Of that Learned and Judicious Clerk, J. Gouldsbrough, Esq. His Collection of choice Cases, and matters, agitated in all the Courts at Westminster, in the latter years of the Reign of Queen Elizabeth". This volume reports about 330 cases. The cases involve almost every action then known to law—trespass, waste, battery, dower, replevin, debt, assumpsit, conduct of attorneys, etc. Two cases with respect to the conduct of counsel and one in assumpsit are of interest:

Attorney Pursuing a Debtor in Two Suits

(28 Elizabeth, 1586)

"An Attorney of the Common Pleas brought an action of debt against another, whereupon he was arrested in the Country, and when he came to London, the Attorney caused him to be arrested in London for the same debt, and this was shewed to the Court, and the Attorney called, to whom Anderson (Judge) said, if a man be sued here

for a debt, and after be arrested in another Court for the same debt, the penaltie is fine and imprisonment, and that is both the law and the custom of this Court, wherefore then have you done this? Surely we will send you to the Fleet for your labour. Attorney: I beseech you, my Lord, consider my estate. *Anderson*: I have well considered it, and that is, that you shall goe to the Fleet, and therefore Warden of the Fleet take him to you. *Windham* (Judge): We will punish such gross faults in you more severely than in others, because you are an Attorney here, and your fault is so much the greater, by how much you are skilful in the law and customs of this Court, wherefore you shall goe to the Fleet".

Slander of an Attorney

(39 Elizabeth, 1597)

"*Martin*, Attorney of the Kings Bench, brought an Action of the case against *Burling*, for slanderous words, viz. *Martin*, is he your Attorney? he is the foolishhest and simplest Attorney towards the Law; And if he do not overthrow your cause I will give you my ears, he is a fool and an ass, and so I will prove him. If these words be actionable or not was the question, in arrest of Judgement after Verdict for the Plaintiff, and to the Court seemed *prima facie*, that they are not. But after the case was moved by *Harris* for the Plaintiff, and then by the consent of all the Court Judgement was given for the Plaintiff; and *Popham* (Judge) said, that to say that an Attorney will overthrow his Clients cause is an Actionable slander".

Assumpsit

(29 Elizabeth, 1587)

"An action of the case was brought upon an *Assumpsit*, the Defendant pleaded *non-Assumpsit*, and the issue was found for the Plaintiff, and now *Gawdy* spoke in arrest of Judgement, because the Plaintiff had alledged no place of the *Assumption*, and he said that when an issue is mistried, it hath been adjudged here that it is not helped by the Statute, and here is no place alledged, whereupon the Tryall may be. *Peryam*

(Judge): The opinion of many hath been, that the Statute shall be taken most strictly, but in my opinion it shall be taken most liberally, so that if a verdict be once given, it shall be a great cause that shall hinder judgement, wherefore allthough no place be shewen, yet when it is tried and found, it seemeth, that he ought to have judgement; and so was the opinion of the Court".

**The Popham Reports
Published in 1656**

Popham's Reports published in 1656, collected by "The Learned Sir John Popham, Knight, Late Lord Chief-Justice of England", etc., cover cases in Elizabeth's reign and in the reign of James I. This volume contains about 220 cases, of which three are here quoted:

**Trespass and Assault
Against a Constable**

(35 Elizabeth, 1593)

"The Defendant saith, that he was Constable of the same Town, and that the Plaintiff the said day, year, and place, brought an Infant not above the age of ten daies in his armes, and left him upon the ground to the great disturance of the people there being, and that he commanded the Plaintiff to take up the said Infant, and to carry it from them with him, which the Plaintiff refused to do, for which cause he quietly laid his hands upon the Plaintiff and committed him to the Stocks in the same Town, where he continued for such a time, untill he agreed to take up the Infant again, which is the same Assault, Battery, and Imprisonment, of which the Plaintiff complains. *Fenner* (Judge) was of opinion that that, which the Constable did was lawfull, and that it is hard that an Officer shall be so drawn in question for it, for this shall be an utter discouragement to good Officers to execute their Offices as they ought to do. *Popham* (Judge), A Constable is one of the most ancient Officers in the Realm for the conservation of the Peace, and by his Office he is a Conservator of the Peace; and if he sees any breaking of the Peace, he may take and imprison

him untill he find surety by obligation to keep the Peace:".

Right to Bear Arms

(39 Elizabeth, 1597)

"Upon an assembly of all the Justices and Barons at Sergeants-Inne, this Term, on Munday the 15. day of April, upon this question moved by *Anderson* Chief Justice of the Common Bench: Whether men may arme themselves to suppress Riots, Rebellions, or to resist Enemies, and to endeavour themselves to suppress or resist such Disturbers of the Peace, or quiet of the Realm; and upon good deliberation it was resolved by them all, that every Justice of Peace, Sheriff, and other Minister, or other Subject of the King, where such accident happen may do it: And to fortifie this their resolution, they perused the Statute of 2 E. 3, cap. 3 which enacts that none be so hardy as to come with force, or bring force to any place in affray of the Peace, nor to go or ride armed, night nor day, unlesse he be a Servant to the King in his presence, and the Ministers of the King in the execution of his Precepts, or of their Office, and these who are in their company assisting them, or upon cry made for Weapons to keep the Peace, and this in such places where accidents happen upon the penalty in the same Statute contained; whereby it appeareth, that upon cry made for Weapons to keep the Peace, every man where such accidents happen for breaking the peace, may by the Law arme himself against such evill Doers to keep the Peace."

**An Innkeeper's Right to Detain a
Horse Although Left by a Stranger**

(14 James I, 1617)

"*Robinson* brought an Action of Trover and Conversion against *Walter*, and upon the whole matter the case appeared to be this.

"A Stranger took the horse of the Plaintiff, and sent him to a common Inn, and there he remained for the space of half a year, at which time the Plaintiff had notice where his Horse was, and thereupon he demanded him of the Inn-keeper, who answered that a person unknown left

the Horse with him and said, that he would not deliver the Horse to the Plaintiff unless he would pay for his meat, which came to 3-*l.* 10 *s.* for all the time.

"And it was resolved by Mountague chief Justice, Crook, and Doderidge, Justices (Haughton Justice dissenting) that the Defendants plea was good, for the Inn-keeper was compellable to keep the Horse, and not bound at his peril to take notice of the Owner of the Horse. And by custom of Lond. if a horse be brought to a common Inn, wher he hath (as it is commonly said) eaten out his head, it is lawfull for the Inn-keeper to sell him, which case of the custom implies this case. . . . And Doderidge said, that if the Law were as the Plaintiff would have it, it were a pretty trick for one who wants a keeping for his Horse".

Preface and Precedents in Owen's Reports

Owen's Reports (about 225 cases, Elizabeth and James I) are those "Of that late Reverend and Learned Judge Thomas Owen, Esquire; One of the Justices of the Common Pleas. Wherein are many choice Cases, most of them thoroughly argued by the Learned Serjeants, and after argued and resolved by the grave Judges of those times. With many Cases wherein the differences in the Year-books are reconciled and explained."

Three cases will be referred to:

A Father's Payment To Get His Daughter Married (39 Elizabeth, 1597)

"The Father makes a promise to Willes, that if he would marry his Daughter, to pay him 80 *l.* for her portion, but Willes demanded a 100 *l.* or else did refuse to marry her, whereupon the daughter prayed her Father to pay the 100 *l.* and in consideration thereof she did assure him to pay him 20 *l.* back again. The 100 *l.* is paid, and the marriage took effect. And the Father brought his Action on the case against the Husband and Wife, for the 20 *l.* Gawdy, and Fenner said, that the Action

would lye: but Popham held the consideration void."

Trespass for a Dog (30 Elizabeth, 1588)

This case was decided in the year of the defeat of the Spanish Armada. At that time the status of a dog seems to have been uncertain.

"In an Action of the Case the Plaintiff declared, that whereas a dog come to the hands of the Defendant which belonged to the Plaintiff, the Defendant did assume to deliver the said dog to the Plaintiff upon request, and that the Plaintiff had requested him, and he did not deliver the dog.

Leigh for the Defendant. There is no consideration; for when the Plaintiff is out of the possession of his dog, he hath lost his interest in him, for a dog is *ferae naturae*, and therefore when he is out of possession he hath no remedy.

Tanfield contra. Horses, cows, and all cattel which are most profitable for service of man, were at first *ferae naturae*; and so were dogs also: but since by use nothing is so familiar and domestick to man than is a dog, then he cannot be *ferae naturae*; and therefore a Trespass will lye for a dog, if he declare his dog, for that word does imply it is his domestick dog; And at last it was adjudged by all the Court that the Action is maintainable, and Judgment commanded to be entred."

Peter Carus Draws His Sword (37 Elizabeth, 1595)

"Peter Carus was indicted for drawing his Sword in *Westminster-hall*, the Court then sitting, in resisting the Sheriff who was making an Arrest; and being found guilty upon his Arraignment, it did appear that this fact was done upon the stairs of the Court, out of the view of the Courts; yet it was held, that being in the Hall, it was as much as if it had been in view of the Court."

The Preface of Winch's Reports

Winch's Reports (125 cases) are of cases in the last four years of the

reign of James I, "faithfully Translated out of an exact french Copie". The most interesting thing about this volume is its preface which begins as follows:

The principal end in publishing Books is the profit which redoundeth to others, and what improvement can there be either more noble in itself, or of greater advantage to the receiver then that of knowledge, and especially of the Lawes of this Nation in which you live, and by which your action ought be regulated: the studie of other learning being private, fitter for Universities then Common wealths, fuller of contemplation, then experience, and more laudable in Scholers themselves, then beneficial unto others; if therefore either benefit will prevail with you, or delight perswade you, then (I beg favour to speak with some confidence) you will finde both those desired motives in this solid Book to Court you:

Hutton's Reports in 1656

The next reports are those "Of that Reverend and Learned Judge, Sir Richard Hutton", published in 1656. These reports cover the reigns of James I and Charles I, being written originally in French by his "owne hand and now faithfully translated into English". Some of these cases are in the period of the Commonwealth, but none of the law reports extant treat the Commonwealth as a regal period. The reports are carried on by years to the date of the Restoration. This volume contains about 160 cases. Two of these have been selected:

Who May Keep Inns (22 Charles I, 1647)

"Upon a conference at Serjeants Inn in Fleetstreet, it was resolved and agreed, by the Lord chief Justice. Sir James Lea, the Lord Hobart, Baron Bromley, Baron Denham, Justice Hutton, and Justice Jones; That any one may erect an Inn for lodging of Travellers, without any allowance or License, as well as any one before the Statute of 2 E:6. might have kept a Common Alehouse or as at this day one may set up to keep hackney Horses, or Coaches to be hired by such as will use them."

(Continued on page 744)

Calvert Magruder:

Senior Circuit Judge—First Circuit

■ Youngest of our Senior Circuit Judges in the length of his service on a federal bench, and next to the youngest in years, is Calvert Magruder of the First Circuit, which is made up of the States of Massachusetts, Rhode Island, New Hampshire and Maine. He was appointed to the Circuit Court of Appeals on June 3, 1939, at the age of 45. Through a series of retirements from the Court he became its Senior Circuit Judge less than four months later, on October 1, 1939.

The Circuit Court of Appeals for the First Circuit consists of

Felix Frankfurter, Circuit Justice

Calvert Magruder, Senior Circuit Judge

John C. Mahoney

Peter Woodbury, Circuit Judges

There are seven District Judges in the First Circuit—George C. Sweeney, Francis J. W. Ford, Charles Edward Wyzanski, Jr., Arthur D. Healey, Aloysius J. Connor, Robert A. Cooper, and John P. Hartigan.

The retired Judges in the First Circuit are George H. Bingham, George F. Morris, and John A. Peters.

Although Judge Magruder's experience and training for judicial work had been very different from that of any other Senior Circuit Judge, he has made an enviable reputation for most capable and painstaking performance of his duties and for incisive opinions grounded in justice and law.

Sketch of Judge Magruder's Career

■ When the Senate of the United States in the summer of 1939 confirmed Calvert Magruder as a Circuit Judge for the First Circuit, one of the leaders of the Massachusetts delegation in the Congress remarked that the appointee was one of the luckiest men he knew. A similar observation might have been made, a few months later, when the new judicial officer became the Senior Circuit Judge. After eight years the lawyers of New England would almost unanimously give the remark a quite different twist, and say that the Bar of the First Circuit had indeed been most fortunate, because in their Senior Judge they have a lawyer who by temperament, by learning, by common sense, and by insight into the basic needs of the society in which he lives, has proved himself a jurist of first-rate capacity and worth.

But it is easy to understand what the Congressman had in mind in 1939. When appointed to the Court, Judge Magruder fell entirely outside the accepted pattern of selection for judicial office. He was not a member of the Bar of Massachusetts or of any State in the Circuit, but of the Maryland Bar. He had not been as frequently in a trial courtroom as in a university classroom. And when not teaching, he had been identified with measures which many of the Bar

regarded as the most extreme examples of New Deal legislation. He had been General Counsel to the first National Labor Relations Board, during the chairmanship of Dean Lloyd K. Garrison; he had played a decisive role in the writing of the final version of the Wagner Act and the legislative reports which accompanied it; and he had been the first General Counsel to the Wage and Hour Administration and the author of many of the earliest regulations and interpretations issued by that agency.

If Judge Magruder was not in the pattern of the practising lawyer, he was even more clearly not in the pattern of a political judge or a political selection. It is said that he did not know The President personally, and that he hardly had met the Attorney General. He had not run for public office, nor had he made, apparently, substantial contributions to campaign finances of his political party. He had had no newspaper publicity; nor was he, nor is he, in any respect a self-seeking man.

His Earlier Life Gave Background and Qualifications

Despite the fact that Judge Magruder did not fit conventional measurements for judicial office, his career

before 1939, at least in retrospect, indicates that he had significant qualifications for the bench. Born in Annapolis, Maryland, on December 26, 1893, he had been reared in a particularly favorable atmosphere. He had been graduated from St. John's College in Baltimore in 1913 and from Harvard Law School *cum laude* in 1917, in which year he was admitted to the Maryland Bar. His father was a judge of the State Court of Maryland.

At Harvard Law School Calvert Magruder was an undergraduate editor of the *Harvard Law Review*, for which in later life he did important index and editorial work and for which he frequently wrote articles, particularly on partnerships, torts and labor law. Upon being graduated from Law School, he became the first of the list of distinguished secretaries who were apprenticed to Mr. Justice Brandeis during the latter's period as an Associate Justice of the Supreme Court.

After serving as a second and first lieutenant in the United States Army (infantry) in World War I and for three years with the United States Shipping Board, Magruder was appointed in 1920 to the faculty of the Harvard Law School, where he still gives a course in torts. With the exception of leaves of absence to serve as counsel for government agencies, he was a full-time teacher for nineteen years, first as Assistant Professor of law, after 1925 as full Professor and from 1930 to 1939 as Professor and Vice-Dean. He has written authoritative text-books on law, is a Fellow of the American Academy of Arts and Science, and is junior warden in Christ Church (Episcopal) in Cambridge. He has been a member of our Association since 1924.

Judge Magruder's Service as Senior Circuit Judge

Within a few months after he ascended the bench, Judge Magruder, through a series of resignations, became the Senior Judge of his Circuit. As a presiding officer he has

won a deserved reputation for fairness, patience and quick comprehension. However, the docket of the Circuit Court of Appeals for the First Circuit has always been so much lighter than that of most other circuits that it has given no rigorous test of Judge Magruder's industry or of his capacity to handle complicated records of long trials.

But an appellate judge is finally tested by the opinions he writes. Judge Magruder had been closely connected with the New Deal. Now there are those who associate the New Deal, and even idealism itself, with a soft heart and a round eye. Yet here, by the tests of day-by-day work, we have a judge in whom acuity of perception and precise learning, and that love of facts which is born of personal experience—all three—happily consort with the idealism at which many people look askance.

Comment on Some of Judge Magruder's Opinions

Take Judge Magruder's opinion in one of those dim aisles that surround the doctrine of *Erie v. Tompkins*. You will find it in *Sampson v. Channell*, 110 F. 2d 754. It is the application of the doctrine to the conflict of laws and the murky distinction between procedure and substantive law. His opinion became the basis for the Supreme Court's decision in *Palmer v. Hoffman*, 318 U. S. 109, although the Court gave Judge Magruder scant credit. Another side to the doctrine is where it does not apply. There a federal Court is left to its own devices. It must find the law for itself. Judge Magruder's Court was called upon to do this in *O'Brien v. Western Union Telegraph Co.*, 113 F. 2d 539. As he said,

There still exist certain fields—and this is one—where legal relations are governed by a federal common law, a body of decisional law developed by the federal Courts untrammelled by State Court decisions.

Here it was the liability of a telegraph company for a libelous message, its privilege where the sender was not privileged. Judge Magruder turned to the general facts of the

situation as his most significant guide, and his opinion marks the leading case on the subject.

Take his concurring opinion in *B. B. Chemical Co. v. Ellis*, 117 F. 2d 829, although it may interest mostly those who are concerned in the conflict between the monopoly of patents and the free enterprise of our anti-trust policies. Yet lawyers who read it will find an outstanding discussion of the *Leitch* doctrine. It ends with an appeal to the Supreme Court to find an early occasion to review the whole subject matter, which, Judge Magruder concludes, is badly needed. When the occasion comes, the Court will have here another basis from which to start its elucidation of present confusion.

Judge Magruder has not specialized in tax law, but in *Sweet v. Commissioner*, 120 F. 2d 77, he unwound one of the subtler problems in that subtle science, a tax ruling which conflicted with a supervening Court decision. With the help of able briefs to which he gave proper credit, he pulled aside the difficulties. One passage from his opinion will illustrate his simple, direct style:

Incalculable confusion would result from a general reopening of old tax cases because of a claimed conflict with supervening Court decisions. Because the law is not quite an exact science, litigants sometimes have the misfortune that their particular case came up for decision too soon or too late to get the benefit of a controlling decision. The situation is not peculiar to tax litigation, for litigants have sometimes won or lost cases on doctrines of torts, contracts, or conflict of laws later overturned. But in litigation affecting the public revenue the need of finality is the more obvious, from the taxpayer's, as well as from the Government's, point of view. If the argument of the present petitioners were accepted, the Government could quite as legitimately apply to the Board to redetermine a case decided in the taxpayer's favor years ago on grounds now appearing to be untenable in the light of later decisions of the Courts. . . . In such an eventuality the taxpayer's cry of dismay would be loud and long, and not without reason. Even if we had the power it seems to us that we ought not to venture into this uncharted field, in the absence of legislation by

Congress carefully devised, within practicable limits, to correct inequalities in the application of the tax laws which occasionally result from the uncertainties of litigation.

These are leading cases, and the opinions are written in that lucid way which the Bar used to admire and for which they once were grateful. Less ponderous than Justice Horace Gray's, they are in the same tradition, written for the benefit of the Bar in general as well as the satisfaction of counsel in the particular case.

Judge Magruder's Concept of the Judicial Function

Judge Magruder's conception of the judicial function does not stop with elucidation of the law. Let him speak for himself, from what he said in expressing his admiration for Justice Brandeis. In the Brandeis commemorative issue of the *Harvard Law Review*, Judge Magruder wrote:

The position of a judge has been likened to that of an oyster—anchored in one place, unable to take the initiative, unable to go out after things, restricted to working on and digesting what the fortuitous eddies and currents of litigation may wash his way. Perhaps there is a modicum of truth in this characterization, but it overlooks the essentially legislative function of the Supreme Court in molding and applying the general language of our Constitution, and of important statutes like the Sherman Anti-Trust Act, so as to accommodate the law to present-day social needs in a society of bewildering complexity and rapid change—a task calling for the highest qualities of creative judicial statesmanship.

Such was Magruder's task and such his approach to the question of the constitutionality of price control, with which he was faced in *Rottenberg v. United States*, 137 F. 2d 850. He was affirmed, the easier for his opinion, by the Supreme Court *sub nomine Yakus v. United States*, 321 U. S. 414. The precise question was the validity of those provisions which denied to the defendant in a criminal prosecution the right to raise the issue whether an OPA regulation was authorized by the statute. From Judge Magruder's plenary opinion,

it will be enough to show the way he approaches such a question:

The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities, affecting a wide range of industries, the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started.

Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. It was not to be anticipated that he would glory in being "arbitrary or capricious", or that he would be loathe to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not "generally fair and equitable". He is at least as much interested as anybody else in the successful administration of his office.

Judge Magruder's Court has had to sustain the burden of a good many constitutional questions. In *American Power and Light Co. v. SEC*, 141 F. 2d 606, he wrote the opinion on the so-called "death sentence" of the Public Utility Holding Company Act, and was sustained by the Supreme Court. In *City of Manchester v. Leiby*, 117 F. 2d 661, his Court joined the number which have had to deal with Jehovah's Witnesses, when it upheld the validity of a local ordinance which required newsboys, including those who distributed religious tracts, to establish their identity and their authority before a public agency.

Characteristics of Judge Magruder's Opinions

In many fields, perhaps particularly

the many phases of administrative and regulatory law, Judge Magruder's clear, direct opinions have commended themselves to the Bar and to text-writers, who frequently quote their principal passages. Indeed, not the least of the Judge's merits is his style. His is a simple and direct prose. There is usually no encumbering apparatus of abstruse footnotes nor indulgence in rhetorical flourishes. Even the losing litigant usually admits that his argument has been adequately stated by the Court, and that in appraising it the Court has tried to proceed in accordance with precedents which are summarized and analyzed with sufficient thoroughness to convince the reader that the judge did not merely copy either a brief citation out of an encyclopaedia or a verbose paragraph out of another tribunal's judicial reports.

There are perhaps two fields usually explored by a federal judge in which Judge Magruder has not as yet challenged the masters. He has shown no penchant for writing patent opinions. And he has not exercised his prerogative of descending to the District Court either to try an equity case or to charge a jury.

The over-all quality of Judge Magruder's judicial ability is perhaps best attested by the fact that Chief Justice Stone chose him as one of the first three judges drawn from the lower Federal Courts to serve on the bench of the Emergency Court of Appeals. This was the tribunal of which Judge Vinson (as he then was) was the first Chief Judge. Another important piece of testimony as to Judge Magruder's capacity, character and fundamental sense of justice was his selection in 1943 by the United States Department of State as the chairman of a special American mission sent to Bolivia to investigate labor conditions, particularly in the tin mines. But the most important evidence of Judge Magruder's standing and performance of duty is the confidence of lawyers and judges, which the Court over which he has presided since 1939 enjoys in full measure.

A Twentieth Century Congress:

Specific Steps for Improving Legislation: A Review

by **Walter P. Armstrong** • of the Tennessee Bar

■ Congressman Estes Kefauver and Jack Levin have published a notable exposition of ways and means of strengthening and improving further the legislative branch of our National Government*. Walter P. Armstrong has written a review and summary of the specific suggestions. In some respects it is supplementary to his review of Professor Binkley's *President and Congress*, in our May issue (page 417); but the present discussion relates wholly to improvement in the methods of functioning, the dispatch of public business, the expertness, and the caliber and independence of the membership of the Congress.

Congressman Kefauver has won National recognition as one of the most thoughtful and forward-looking lawyers of the Congress. He has been a member of our Association since 1943, and has given staunch support to many of its proposals. American lawyers who recognize that the capacity, prestige and authority of the Congress have a greatly enhanced importance to American institutions under the recent interpretations of the Constitution will read with sympathetic interest the Kefauver-Levin proposals and Mr. Armstrong's commentary on them.

■ The co-authors of this significant

June volume are Estes Kefauver, member of the Congress from the Chattanooga (Tennessee) district, and Jack Levin, a capable and experienced governmental consultant. Internal evidence suggests that Dr. Levin acted in an editorial capacity. The opinions expressed are those which Mr. Kefauver has consistently advocated during the eight years he has been in Congress. The practical knowledge of the physical needs of the legislative body and the political realism shown could hardly have been acquired without personal experience. In discussing the legislative-executive relationship, the book speaks from a point of view exclusively that of the Congress.

This study was published some four months after the effective date of the LaFollette-Monroney Act¹ and takes into account the limited experience under that statute. While appreciating the progress made under this Act, the authors point out that the Resolution creating the Joint Committee tied its hands by forbidding consideration of "certain basic matters that go to the heart of any thorough repairing of ancient Congressional machinery. Equally important, due to the wide divergencies of viewpoint existing among the

members of the Joint Committee, only a part of the worthwhile suggestions that were made found a way into their Report to Congress. Finally, even the recommendations of this diluted Report were whittled down drastically by the political compromises that were essential if any reorganization bill was to pass at all. Consequently, the real job still remains." (page ix.) This is in accord with other views. Robert Heller² "estimates that the Act carried reorganization only half way toward the necessary goal", while Representative Monroney has been quoted as declaring that there has been "backsliding from the Act roughly at about 20 per cent."³ Dr. George B. Galloway, staff director of the Joint Committee on Reorganization is quoted as saying that "if reorganization stops here, some of the changes may do more harm than good." (page 221.)

Practical Suggestions for Mechanical Improvements

Where do we go from here? This is the question which Mr. Kefauver and Dr. Levin pose for themselves. Among the practical suggestions: Voting by electricity, estimated to save 24.3 legislative days each session; better telephone service; loud speak-

*A TWENTIETH CENTURY CONGRESS. By Estes Kefauver and Jack Levin. New York: Duell, Sloan & Pearce. June, 1947. \$3.00. Pages xiv, 236.

1. Legislative Reorganization Act of 1946, Chapter 753; Public Law 601, 79th Congress 2nd Ses-

sion. Cf. "The Legislative Reorganization Act of 1946", by Charles W. Shull, *Temple Law Quarterly*, January 1947; Vol. XX—No. 23, page 375.

2. Author of *Strengthening The Congress*, National Planning Association, Washington, 1945. Cf. review by Armstrong, 31 A.B.A.J. 188; April, 1945.

3. The quotations are from "Congress Is Far From Reorganization", by Philip S. Broughton, *New York Times Magazine*, May 18, 1945. The "backsliding" referred to by Mr. Monroney is the violation of the spirit of the Act limiting the number of committees by creating special committees and dividing standing committees into sub-committees.

ers which will carry the floor proceedings to the office of each member. The desirability of the first two of these proposals is not fairly debatable. It is doubtful whether it is desirable to take the chance of decreasing the already tenuous attendance by enabling the members to follow the proceedings over loud speakers. There are other methods, with fewer disadvantages, of conserving the time of the members.

It was no doubt Mr. Kefauver who realized the importance of solving the problem of how a Congressman who desires re-election can serve as Washington representative of his constituents without sacrificing so much time as to disable himself from being an efficient Member of Congress. He concretizes the present situation by describing his activities on a typical day. The tabulation lists, during a fifteen-hour day, eight tasks for constituents, eleven as Member of Congress, five under both heads and three personal matters. The ideal solution of this problem would be a stringent act prohibiting a member of Congress from appearing in any capacity on behalf of any constituent. Mr. Kefauver's suggestion is that each Representative be given an administrative assistant who will act as "chore boy" for constituents. This limited relief the LaFollette-Monroney Act did accord to Senators but denied to members of the lower House.

Making the Office More Attractive to Men of High Caliber

Mr. Kefauver and Dr. Levin are concerned not only with increasing the potential efficiency of members of the type of those who constitute the present, and have made up the membership of past, Congresses, but with enlarging the caliber of those who will successfully seek election in the future. How can Congress be made more attractive to men whose character and capacity would make them desirable members? There are two suggestions: Adequate pay, including better retirement provisions, and longer terms. The LaFollette-Monroney Act increased the pay to \$12,500 a year with commensurate

retirement benefits. The authors do not definitely commit themselves, but apparently they deem this still insufficient. They endorse President Truman's suggestion that the salary should be nearer \$25,000 a year. The term they recommend is one of four years. Few men who have the qualifications that should be possessed by a Member of Congress earn in private enterprise a less amount or have less security than this.⁴

Changes Which Would Require a Constitutional Amendment

The lengthening of terms would, of course, require a Constitutional amendment. It is, however, within the scope of an objective which is better qualified Congressmen and a more efficient Congress. This is true also of another proposal that can be effectuated only by amendment—the granting of local autonomy to the District of Columbia. While justice to the residents of the District is sufficient reason for such an amendment, it would result in considerably lightening the burden of an over-worked Congress by salvaging thirteen legislative days.

A chapter is devoted to the only other amendment suggested—permitting the ratification of treaties by a majority of each House. Sound and familiar arguments are advanced—the Senate's alleged unsatisfactory record on treaties, the necessity of implementation by the lower House, the increasing use of Executive agreements, "closing a gap in democracy". As important as this subject is, it is beyond the frame of the authors' real design—"modernizing what is still inadequate Congressional machinery".

This is the only departure from a symmetrical plan which consists in the main of projecting and supplementing the LaFollette-Monroney Act. As great an advance as that Act is, it is not satisfactory even in the



ESTES KEFAUVER

way in which it deals with the subjects which it covers. Even the Tort Claims Act contains so many exceptions and limitations that Congress may still be required to handle many claims.⁵

The Legislative Reorganization Act Has Not Attained Its Goal

It was by reducing and paralleling the committees of the House and Senate that the proponents of the Reorganization Act hoped to accomplish the greatest reform. There has been improvement but the goal is far from attained either in theory or practice. It was a major accomplishment of the Reorganization Act to reduce Senate committees from thirty-three to fifteen and House committees from forty-eight to nineteen. Moreover, some of the Senate and House Committees are matched so as to have identical functions. Mr. Kefauver and Dr. Levin endorse the proposal of Dr. George B. Galloway⁶ for thirteen committees in each House, with indentic functions. They do not suggest, however, how the evil of sub-committees⁷ and special committees is to be eliminated. Riders to appropriation bills are

4. The disparity continues, notwithstanding the fact that the present income tax law has so greatly reduced the net reward offered by private enterprise. Perhaps a balance can be struck which will make the financial return from public office comparable with that of private business.

5. For a discussion of the Tort Claims Act, see "Tort Claims Against Government: Municipal, State and Federal Liability", by Edwin Borchard; and "Federal Tort Claims Act: Comments and Questions

for Practising Lawyers", by Harold G. Aron, 33 A.B.A.J. 221 and 226; March, 1947.

6. See *Congress at the Crossroads*, by George B. Galloway (Thomas Y. Crowell Co.; New York, 1946).

7. In the *New York Times* of April 14, 1947, is a list of 146 sub-committees. See also *United States Code Congressional Service*, 1947, Advance Sheet 4 (page 23 et seq.).

prohibited by the Reorganization Act; they should not be permitted to be attached to any bill.

The Act provides that the House taxing and spending committees shall meet jointly at the beginning of each session and prepare a legislative budget fixing the maximum amount to be appropriated. "But these well-intentioned provisions are of little value because there are no means of enforcing them. The only effective way that receipts and expenditures can be balanced is to vest the money-raising and spending powers in . . . one Committee . . ." (page 119).

Present Methods of Selecting Committee Chairmen and Members Have Defects

At present the Democratic members of the Ways and Means Committee of the House, selected by the Democratic caucus, constitute the Democratic Committee on Committees and a second caucus ratifies their assignments. On the Republican side the delegation from each State that has one or more Republican representatives selects one member of the Republican Committee on Committees. That member has as many votes as there are Republican representatives from his State. Mr. Kefauver, a Democrat, prefers the Republican method.

Seniority, it is argued, should be "ignored" in selecting Committee chairmen and ranking members. Instead, by secret ballot, majority members should elect a chairman and minority members the ranking member.

To use the expression of the authors, the chairman should be the servant, not the czar, of the Committee. The Reorganization Act makes it the "duty" of Committee chairmen to report promptly to the floor bills approved by a Committee. There is, however, no easy method of enforcement. Committee action would be made effective by automatically assigning to the calendar of the Senate and House bills unanimously reported and by discharging from a Committee and placing on the calendar

bills for which this request is made by one-third of the membership of any Committee.

Methods of Increasing Party Responsibility as to Legislation

The authors are concerned over the lack of party responsibility in Congress. The Democratic caucus is an ineffective method of determining or enforcing party policy. One of its rules provides that members are not bound upon questions involving a construction of the Constitution or upon which members have made contrary pledges to constituents or received contrary instructions from the nominating authority. Partly because of this rule, but largely because of the heterogeneous composition of the party, Democratic caucuses have almost ceased to be held and there is almost a complete lack of party responsibility. This rule, it is suggested, should be abrogated and the authority of the caucus revived.

An even better way of fixing party responsibility, it is insisted, is to provide for majority and minority Joint Policy Committees. The majority policy committee (National Legislative Policy Committee) would consist of the Vice President or President *pro tem* of the Senate, the Majority Leaders and their Whips and the thirteen Committee chairmen from each House. The Minority Policy Committee would consist of the opposite numbers to the members of the majority Committee. The function of these Committees, which would be entirely independent of

the Executive, would be to prepare a legislative program, draft needed legislation and to scrutinize the execution of this legislation.⁸

Congress and all Committees should be adequately staffed. The staffing suggested seems to be such as would enable Congress not only to initiate, draft⁹ and thoroughly consider legislation but such as would equip it for supervising to a large extent the Executive Department.¹⁰

The only proposal looking to better legislative-executive coordination is based on the belief that there would be less friction if Congress had a better understanding of the conduct of the Executive Department and could exercise more informed supervision. This would be effectuated by each Executive Department and major agency maintaining an office on Capitol Hill with a top-flight representative in charge. Day-to-day liaison would be maintained with the chairmen of appropriate Senate and House Committees. Monthly these department and agency representatives would report to a joint meeting of the Senate and House Committees charged with the duty of legislation in their fields. At least every two weeks there would be a Question and Answer period of not more than two hours in each House. Members of the Cabinet and heads of agencies would be invited to attend and, under proper safeguards, asked to answer questions concerning their departments. Thus Congress would be kept fully informed as to Executive activities.¹¹

8. The Reorganization Act as introduced provides for Policy Committees limited in scope. This provision, while approved by the Senate, was stricken out. The Senate, however, was given a Policy Committee for the first six months of 1947. There has been no extension.

9. In the past the House at least has, because of inadequate staffing, been almost forced at times to rely upon outside aid in drafting and considering legislation. It is sometimes difficult to determine whether this help is coming from interested lobbyists or expert, public-minded, altruistic organizations. Mr. Kefauver gives the American Bar Association full credit for having rendered significant public service in the latter capacity. (page 183.)

10. The rules of agencies would "be tentative until the appropriate Congressional Committee has examined them." (page 151.) If there was no objection within a time fixed the rules would become effective. The basis of this is that here is a partial delegation of legislative power which should remain subject to the veto of the legislative. The

Act authorizing the promulgation of the Rules of Civil Procedure contained a similar provision. Act of June 19, 1934, Chap. 651, Secs. 1, 2 (48 Stat. 1064); U.S.C., Title 28, Secs. 723b, 723c.

A logical development would be Morris Ernst's suggestion: "It seems to me that in every case where the Court has split on a matter of important interpretations as to what Congress meant in a statute, some Committee of the Congress should promptly meet to decide whether the legislators meant what the majority wrote or what the minority thought." Review of *The Nine Young Men* [by Wesley McCune], New York Times Book Review Section, June 8, 1947. If the Executive Department is to be supervised, why not the judicial?

11. Although there have been many similar proposals, in recent years Mr. Kefauver has been the chief advocate of the Question and Answer period. Cf. "The Kefauver Resolution", by Armstrong, 30 A.B.A.J. 326; June, 1944. Mr. Kefauver's resolution contemplates separate Question and Answer periods for the House and Senate. Perhaps time could be saved by a joint arrangement.

The Book Is Highly Significant and Realistic

The descriptive word for this book is "significant." It is thoroughly informed. I know of no better description of the workings of a present-day Congress. An illustration is the accurate statement of the current closure¹² rule of the Senate. Moreover, the history of Congressional procedure is thoroughly explored. The story of the function of the caucus and how it has varied from time to time is well told. Although I have long known that Speaker Cannon controlled the House through the Rules Committee, I never knew until I read the excellent explanation in this book just how step by step the Rules Committee acquired its dominant power. It is practical. Only a Congressman who has felt the almost unendurable pressure of his duties and obligations, real and assumed, could picture the relief that would be afforded by mechanical aids.

It is realistic. There is implicit recognition of the fact that a major motive in the conduct of every Congressman is his own re-election, and that to further this he must be the efficient Washington representative of his constituents and the generous almoner for his district.¹³

It is written entirely from the point of view of Congress and chiefly

from that of the House. This to me is the permanent significance of the study. The function of the President as a part of the legislative is, if not ignored, at least greatly minimized. The constitution of a National Legislature Policy Committee "would tend to correct the unique and almost unfair advantage which the President usually enjoys" (page 130). The abdication of power by Congress during the forepart of the Roosevelt administration is attributed to lack of proper organization.

There is much truth in all this. It does not, however, give sufficient weight to the inescapable fact that the President is a part of the legislature. He has the constitutional duty of proposing legislation and of signing¹⁴ or vetoing bills. Whether in legislation his leadership or that of Congress will be accepted and

what shall be done in the event of an impasse is a question for the American people. As the authors say—this is a "grave problem which goes to the heart of democracy" (page 222). There is little in our recent history to encourage the opinion that Congress within the foreseeable future will develop the capacity to formulate a comprehensive legislative program. Men are led by dynamic individuals, not by impersonal committees.

My own view is that all of the reforms the authors suggest should be adopted. The result would be a Congress of maximum efficiency. The battle for leadership between it and the President would be one of giants. With each side exerting its full potential strength the American people could make an informed decision.¹⁵

12. Reluctantly I accept the authors' use of the French term "clature" rather than the English "closure". Cf. *The King's English*, by H. W. and F. G. Fowler (Clarendon Press, Oxford, England, 1906), page 23.

13. Recognized is the disinclination of a Committee to drop a "hot" investigation.

14. A recent interesting development has been an explanatory message by President Truman stating his view as to the meaning of a bill which he signed. Cf. "A Rare Formula for Presidential Messages", by Arthur Krock, *New York Times*, May 16, 1947. In fact, such an explanation by the President is not, as stated by Mr. Krock, "rare". It has often been done. In his recent Cardozo Lecture, delivered March 18, 1947, before the Association of the Bar of the City of New York, Mr. Justice Frank-

furter brilliantly discussed the use by the Supreme Court of extraneous material in the interpretation of statutes. To consider the interpretation of the President would be an innovation. However, as he has a constitutional duty as a part of the legislative, his views would seem to be entitled to consideration along with those of individual congressmen and congressional committees.

15. Cf. "The President and the Congress", by Armstrong, 33 A.B.A.J. 417; May, 1947. When the present Congress was elected, President Truman said: "The people have elected a Republican majority to the Senate and to the House of Representatives. Under the Constitution the Congress is the law-making body. . . . I accept their verdict in the spirit in which all good citizens accept the result of any fair election."

Association Represented in Conference on Foreign Policy

■ In an effort to place accurate and timely information regarding American foreign policy in the hands of "representatives of the various National organizations which have done much to inform their membership and the general public regarding international problems", the State Department convened on June 4-6 a meeting of the accredited representatives of selected organizations. The American Bar Association was represented by President Carl B. Rix and former President William L. Ransom, Chairman of the Committee

for Peace and Law Through United Nations.

At the sessions held in the new State Department Building, virtually every phase of American foreign policy was presented authoritatively and "off the record", by spokesmen for the Department and the United States Delegation to The United Nations. Panel discussions in small groups followed the general sessions. It is planned to hold future meetings, to the end that public opinion and the considered judgment of representative National organizations

may be taken into account in the development of American foreign policy. The various actions voted by the House of Delegates as to The United Nations, the World Court and international law, have been communicated to the State Department and the American Delegation to The United Nations.

The Association's Committee met in Washington on June 5 to consider developments to date and plan its work preparatory to its further report to the House of Delegates in Cleveland in September.

Obsolete Laws:

Senate Committee Starts Work for Their Repeal

■ Declaring that "I feel sure that I can count on the able support of the American legal profession and, in particular, of the American Bar Association in this endeavor, based upon previous reports to me and warm assurances of eager assistance", Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary, has launched a vigorous campaign to repeal or amend obsolete laws and parts of laws, to "clear up the legal rubbish that clutters our statute books". A complete codification of federal laws was also urged as imperative.

His first bill, referred to his own Committee, was aimed at fifty-three laws and parts of laws. The Committee created a sub-committee to study and report. The sub-committee has queried the Executive departments affected, to see if they have practical reasons against repeal. The tasks ahead are not easy.

■ Chairman Wiley has tackled the job systematically. He first had the invaluable Legislative Reference Service of the Congressional Library prepare a list of obsolete laws and sections. With his remarks he placed in the *Congressional Record* a statement on the fifty-three laws he seeks first to repeal, with comment in each case on the law's status and what has superseded the law—in one or two cases an Amendment of the Constitution.

"One of these laws", he said, "relates to the National Prohibition Act which has been made obsolete by the 21st Amendment. Some of the legislation deals with the Government of the Philippine Islands", which now are independent.

"It will be ideal," he said, "if we can possibly repeal at the rate of a law a day or two laws or more a day as the case may be, for as long as this Congress is in session". This recalled to the minds of cynics the fact that when Bruce Barton came to the House from New York, more than a

dozen years ago, his platform was "repeal-a-law-a-day". So far as is known, nothing was repealed through his efforts. But he was not "after" the obsolete laws; he was not a lawyer; and he was only a "freshman" Congressman, not the Chairman of one of the most important Committees in the Senate.

To Emancipate Current Law from Outmoded Statutes

"Repealing obsolete laws in no mere negative activity", Chairman Wiley told the Senate. "It is constructive in that it reveals the core of current law free from the surrounding mass of outdated statutes. Too long have we been so intent on passing laws that we completely lost sight of obsolete statutes which have grown in number to staggering proportions. I have always felt very strongly that the particular function of the Committee on the Judiciary is not merely to grind out new laws which are necessary. It should also be the function of the Judiciary Committee to

initiate a thorough house-cleaning of our statute books.

"The average practicing lawyer today must devote an extraordinary amount of time and energy in search of the law. The Federal Statute Law is lodged within the pages of fifty-nine heavily bound volumes and a sixtieth volume is ready for binding. These volumes, the Statutes at Large, are today the basic federal statutes available to the public. Their publication did not start until 1845. They have continued in substantially the same form down to the present time and contain in chronological order all public acts, resolutions, private acts, and treaties."

Codification of Federal Statutes as the Needed Remedy

Senator Wiley emphasized that his paramount interest is on the constructive side, rather than merely in sorting out and repealing the obsolete laws. "Actually the remedy for this disorganized and burdensome state of federal law lies in an enacted codification", he said. "Statutes must be assembled and codified so that order, coordination, and logical sequence will result where there is now only disjointed bulk and obscurity. The Dean of Law at one college last year rightly asked whether a Nation could call itself truly civilized when its law could not be located, much less stated, by experts.

"The Congress has taken no action to enact a general codification of the federal laws since 1874. By the Act of June 20, 1874, the Revised Stat-

utes of the United States were authorized to be published; and the first edition was officially published on February 22, 1875. Section 8 of the Act stated that the revision was to be legal evidence of the laws and treaties therein contained. By Act of March 2, 1877, a new edition of the Revised Statutes was authorized but not enacted, and this edition was published on February 18, 1878. The Revised Statutes are the only complete enacted codification of the federal law in existence.

"Separate fields of the law have been codified. The *Criminal Code* was established by Act of March 4, 1909 (35 Stat., 1088). That codification was an important step in the administration of federal criminal law. Many additional laws have been enacted, however, and the time has come when revision of the Criminal Code should be considered.

"The *Judicial Code* was authorized by the Act of March 3, 1911. That codification established order and practicable working connections, and the statute law affecting federal Courts and the judiciary.

"The *Internal Revenue Code* was enacted by the Act of February 10, 1939 (53 Stat.). This was done because confusion had reached a critical stage and codification was imperative in the best interest of the public and for the practice of tax law. Even the experts were at a loss to apply the law to tax problems. Since the Internal Revenue Code was published, however, complete revision of the taxing structure has taken place. Supplements and additions to the Code tend to confuse and obstruct the search for the true law. A new and revised Code is the only adequate remedy.

"The Nationality Act of October 14, 1940, codified the federal laws concerning citizenship, immigration, and naturalization.

Complete Recodification and Recognition of Statutes Is Imperative

"The *United States Code*, a codification of the general and permanent laws of the United States in force December 7, 1925, was authorized by Act of Congress on June 30, 1926.

The compilation of this Code was a tremendous task—ably accomplished.

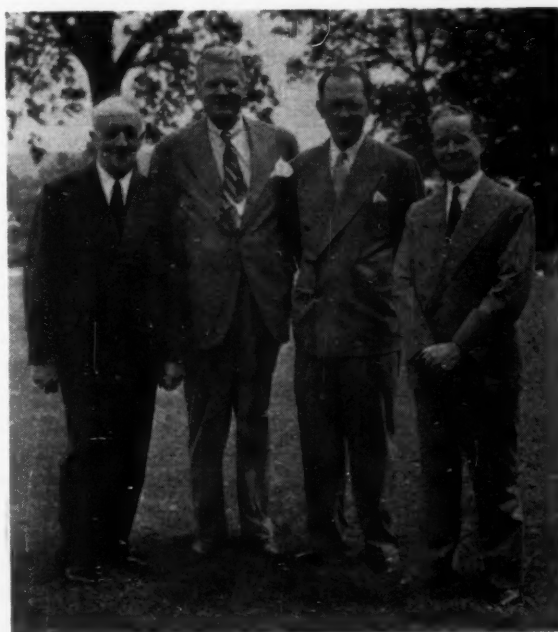
"By the terms of the Act, however, as found in Section 2 (a), the matters set forth in this Code are only *prima facie* the laws of the United States. It still remains for the lawyer to prove the statute upon which he rests his case, should there be a failure of judicial notice or objection to the admission of matter set forth in the Code. That points out one of the shortcomings of the United States Code as it is now constituted. The remedy again is a complete codification and recognition of all Federal statutes as the law of the land as of a date certain to be designated in the creating Act.

"It is my hope that the Committee on the Judiciary, some time before the end of the year will be able to make some conclusive recommendation to the Senate respecting the complete codification and legislative recognition of all federal statutes. The Committee has already initiated steps to revise the annotations on the United States Constitution since January 1, 1938."

■ On a June afternoon on the slightly lawn at Mt. Vernon, the *Journal* was able to obtain a photograph which enables a measure of recognition and justice to four lawyers whom we may call the Association's "backfield".

"Quarterback" Carl B. Rix is at the left (in the photograph only); he is known to thousands of our readers, because he has attended and addressed their meetings, in many States and localities. Association Treasurer Walter M. Bastian of Washington; Secretary Joseph D. Stecher, of Toledo, Ohio; and Howard L. Barkdull, of Cleveland, Ohio, Chairman of the House of Delegates, are the other members of this "triple-threat" combination who contribute so much time and ability freely to the effectiveness of the Association "team".

They can and do "carry the ball" proficiently for our Association's objectives, administer many details of the Association's business and finances most diligently and watchfully, and "spark-plug" the work of the House of Delegates, the Board of Governors, and the many Sections and Committees. We all are in debt to them, as to many others, for the time and skills they give without stint to work for us and for the American people.



International Law: World Government and the Role of Law

by **Herbert W. Briggs** • Professor of International Law, Cornell University

■ Because these subjects are vital and our readers should form their own opinions, we have given what we could of our limited space to widely differing views. Dr. Briggs is Professor of International Law and Chairman of the Department of Government at Cornell University. He was born in Delaware in 1900, and studied at the University of West Virginia, at Johns Hopkins, and at the Academy of International Law at The Hague. He has taught at Johns Hopkins, at Oberlin College, and at Cornell since 1929. He is a member of the Board of Editors of *The American Journal of International Law* and of the Advisory Committee of the Harvard Research in International Law. He is the author of *The Law of Nations—Cases, Documents and Notes* and of *The Progressive Development of International Law* (in press). He has recently returned from Turkey, where he lectured under the auspices of the Turkish Institute of International Law at the Universities of Istanbul and Ankara and the Turkish General Staff War Academy.

■ In the June number of the *JOURNAL*,¹ Mr. Samuel J. Kornhauser tells us that "millions of persons normally unaffected by illusions" are now for world government. The illusion that world government is politically possible derives from an incredibly naive conception of politics and the social world. Mr. Kornhauser wants certainty in an uncertain world. He believes that problems of power, of politics, and of human nature, can be "solved" once and for all, if we are only daring enough to apply the one correct formula—"world government under law".

In many a glittering phrase he assumes the "solution" of a problem which he has merely stated. Wars, he assures us, will end "only when *irrefragable* controls are established which . . . *can* and *will* prevent resort to force anywhere and under any circumstances". "Suitable" international relations "must come through

a *self-imposed* 'government of laws, not men.'" In listing his Essentials of a Government by Federal Union, he assumes that "the principle of Representative Government would *of course* be the foundation stone"; that the British Cabinet system could be wrenched from its sociological setting and applied on a world scale; that the central world government can be so limited "that *by no possibility* could unconferred powers be usurped", although "it would be equally essential that such a central Government should possess all powers needed to enable it to enforce obedience to the law and *thus preserve peace*." A "Bill of Rights for all persons over all the world" must "be accompanied with *effective means*" for enforcing it. He proposes "to unite the entire human race . . . under some form of over-all government designed to *make certain* the *solution* of international differences," and to "*make security* for all

certain and indestructible."

What of Soviet Russia? If Russia, he writes, "desires *above all* security against outside attacks . . . she *should* be the first to welcome" world federalism, and "in due course" the Russian people would "establish processes of self-government", although the Union of Soviet Socialist Republics, like Rhode Island, might for a short time be reluctant to join the Federal Union.

Is "American Experience" a Guide to a World Federal Union?

Like so many world government dreamers, Mr. Kornhauser assumes that he has discussed a method of achieving world government when he has only pointed to a model—"American Experience with Federal Union". Those who believe that the American experiment of 1789 can be repeated on a world scale in 1947 should ponder the words of John Jay in *The Federalist*. "Providence", wrote Mr. Jay,

has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who by their joint counsels, arms, and efforts, fighting side by side, throughout a long and bloody war, have nobly established general liberty and independence.²

To assume that American experi-

1. "World Government Under Law: American Experience with Federal Union As a Guide," 33 A.B.A.J. 563; June, 1947.

2. *The Federalist*, No. 11 (Everyman Edition), page 6.

ence in 1789, with a largely homogeneous population of about 3,000,000, about ninety per cent agricultural, already fused into a semblance of National unity by a long and bloody war, can set a pattern for the world of 1947 is to stretch credulity as much as does Mr. Kornhauser's frequent comparison of Soviet Russia with Rhode Island as the state which would not "play along."

The world of 1947, unlike the world of 1789, experiences the disparities caused by the great industrial and technological revolutions of the 19th century. The conquest of distance, the technology of transport and communications, have not reduced industrial and social differences between Ethiopia and the United States, Siam and Soviet Russia, China and the United Kingdom to a point where a "world legislature" can enact universally applicable legislation for control of corporate industry, regulation of conflicts between labor and industry, agricultural development, or social security. The men of 1789 were politicians who worked within the framework of social and political realities; they knew the limitations and potentialities of the materials with which they had to deal. Success in politics in 1947 requires a similar knowledge and wisdom.

In our country alone has a system of Federal Union been successfully tested, states Mr. Kornhauser as an argument for taking it out of its American context. He proceeds at some length to tell us how difficult it was to achieve even within the American context. However, "our capacity for compromise, that prerequisite to self-government, ultimately prevailed." This is only another way of saying that compromise and self-government were possible for us because all accepted the rules of the game, the framework of representative government itself. Our first settlers, he writes, "were men and women in whom aspiration for human liberty and personal dignity, which had previously ripened in the British Isles, was the preponderant impulse of life. They had a profound

respect for law, a stern abhorrence for arbitrary, personal government."

Will "Representative Government" Certainly Be Accepted?

What leads Mr. Kornhauser to think that "the principle of Representative Government would of course be the foundation stone" of a world government? The very essence of the ideological struggle between democracy on the one hand and communism and fascism on the other lies in their differing conceptions of representative government, of human liberty and personal dignity, of a government of laws, not of men. Can compromises on these questions be the basis of world government? "The great international conflicts which change the face of civilizations", observes Hans Morgenthau, "challenge the very survival of the existing framework of interests and values. . . . The solution is here not the give-and-take of rational compromise but the victory and defeat of political warfare, because the issue is here not the more-or-less of political competition but the *Aut Caesar aut nihil* of the struggle for absolute power."³

Fortunately for the peace of the world, The United Nations Charter does not yet require representative government as a condition for membership in the Organization. The Charter provides an accepted, if precarious, framework within which war between the United States and the Soviet world may be made less "inevitable" than it would be if we attempted to require changes in three-fourths of the governments of the world as the basis for a democratic world government.

Phrases Which Need a Clinical Analysis Before Acceptance

However, Mr. Kornhauser wants certainty—in the settlement of international disputes, in the prevention of war, in the preservation of an indestructible security—for all. Because he believes, quite correctly, that The United Nations is unable to fulfill these functions with certainty, he imagines a world government in which solutions will be automati-



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cally certain. The advocates of world government appear to suffer from a congenital inability to face questions of method. Instead of discussing how or by what means we can set up world government and prevent the use of force, they offer us glittering phrases: "the transfer of sovereignty", "the rule of law", with "preponderant military power" to enforce it.

Subject any one of these phrases to clinical analysis and you will find it vitiated by unstated assumptions. For example, sovereignty is not actual power; it is a juristic theory concerning the authority of the state in the field of law. Even if you could transfer the concept to a world government, actual power—man-power, natural resources, and industrial potentials—would remain in the Russian Nation or the American Nation. Similarly, "the rule of law" as an alternative to international anarchy is based upon an assumption of the intrinsic regulative powers of the rule of law irrespective of social conditions. "Preponderant military power" must have a geographical location and appears on examination to be Russian or American or the might of other national groups. Moreover, the assumption that it can be made automatically available to a world government rests upon still another assumption—that power poli-

3. Hans Morgenthau: *Scientific Man vs. Power Politics*, Chicago, 1946, pages 107-108.

tics will not exist in a world state.

The advocacy of world government is essentially a flight from reality. The facts are too hard to be faced: Power politics is inseparable from social life itself; there can be no certainty in politics, no automatic solutions; international law is sometimes violated; The United Nations is capable of only temporary and precarious adjustments. Therefore all must be repudiated in a vain, but satisfying, flight of the imagination.

The Role of International Law in a World of Irrational Realities

To some of us it seems more important to study the role of international law in a world of irrational political realities, to analyze the relationships between law and force and politics, to discover why The United Nations is no better than it is and how to avail ourselves of its potentialities.

Armed only with the valor of ignorance, Mr. Kornhauser asserts as a "melancholy truth" that "there is no such thing as International Law", because there is no "effective" authority to enforce it. No one who, like the writer, has laboriously compiled and edited hundreds of decisions on questions of international law for Lauterpacht's *Annual Digest and Reports of Public International Law Cases* can accept such disillusioned nonsense. A recent book has referred to "the unreality of international law and the unlawfulness of international reality." This clever phrase, while far from providing an accurate statement of the truth, nevertheless suggests an insight into the problem—the inadequate institutional development of international law. The problem of international law is not so much one of enforcement: Except in time of war violations of international law are the exception, not the rule. The real weakness of international law, as Professor J. L. Brierly has observed, is that international law "is in fact just a system of customary law, upon which has been erected, almost entirely within the last two generations, a superstructure . . . of treaty-made law; . . . customary law can never

be adequate to the needs of any but a most primitive society, and the international society of today is not, except in the matter of its law, . . . at the primitive stage."

Moreover, a system of law is not identical with a system of government, nor an adequate substitute therefor. The tendency to regard the international legal system as a rudimentary international government or to blame the system itself for its narrow scope is wide of the mark. It overlooks the fact that law is not a self-generating mechanism; law is the creature of men, and the men who direct state affairs have failed to provide and operate adequate international institutions for the performance of governmental functions in the international field.

The United Nations Charter Provides Procedures and Institutions

The Charter of The United Nations was not designed to provide solutions, but to provide procedures and institutions for the performance of functions which transcend national frontiers. Overemphasis on the form of organization—for example, the demand for "world government" instead of The United Nations—is based on a futile search for automatic "solutions".

Among the procedures provided by The United Nations Charter is a qualified method of collective action to maintain international peace and security. According to Article 39 of the Charter, it is not each individual Member of The United Nations but the Security Council which "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken". By Article 42 the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." By Article 25 "the Members of The United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." And, finally, Article 2, par. 5, provides that "all

Members shall give The United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which The United Nations is taking preventive or enforcement action."

Concededly, action by the Security Council might in some cases be prevented by a Great Power veto. However, it should not be forgotten that by the great Principles of the Charter embodied in Article 2 *all* Members of The United Nations, whether possessing the veto or not, are legally obligated to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of The United Nations"; and *all* Members are legally obligated to "fulfill in good faith the obligations assumed by them in accordance with the present Charter." Nor should Article 51 be overlooked. Article 51 provides in part that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of The United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

The Difficult Role of Collective Force or Sanctions

These provisions lead directly to the most difficult problem of international organization—the role of collective force or sanctions. In approaching this problem it will be useful to consider what force cannot do as well as what it can do. For example, it is easy to overemphasize the importance of punitive sanctions in answering the question why obedience is generally yielded to law. The jurisdictional immunities of the British ambassador in Washington or the Russian diplomats in China are customarily granted without any show of force. Indeed, it is difficult to see how the immunities could be secured by a display of force. Whatever the reasons—reciprocity, self-interest or morality, habit of law observ-

ance or fear of the consequences—and whether we are considering national law or international law, we shall find that the actual employment or even the threat of force is the exception, not the rule, in securing obedience to law. It is even more obvious that in the daily performance of governmental functions force and the threat of punitive sanctions play a minor part.

Having said so much—that neither a functioning system of law nor a civilized system of government is based on the employment of force—it will be well to ask what force can do. Force can win a war; but can it solve the problem of the causes of war? How many of the peacetime problems of international relations will yield a solution to the application of collective force? These questions suggest that although force may be incapable of solving problems, force may be necessary to establish a situation in which government can function. Our problem is not so much one of law enforcement, as it is the larger one of public order. It is protection against violence that is essential. This means that collective force may occasionally have to be employed against a recalcitrant state.

Now I have merely stated a conclusion, not solved a problem. Our difficulties are only beginning. There are seductions in the oft-repeated words "the collective might of the international community." There is an implication that sanctions are impersonal and automatic; that problems of when and what and how can be solved by putting certain stipulations into a treaty; and that sanctions will seriously injure only the state against which they are applied.

The Great Wisdom of the Drafters of the Charter

In facing these problems the drafters of the San Francisco Charter demonstrated great political wisdom. Instead of attempting the impossible by placing the collective use of force in a rigid legal formula which supposedly would operate automatically in all conceivable situations—instead of this, they entrusted a political

decision to a central political organ—the Security Council. In politics there are no automatic solutions. Political wisdom dictates the approach to each new problem on its individual merits. Sanctions, or the threat of sanctions, may be very effective against small states. Possibly a sufficiently determined group of states might even apply sanctions against a Great Power—with or without war. No appraisal of the role of collective force in the functioning of a system of international government should disregard any of these possibilities; but it remains true that effectively organized sanctions are an end-product of international organization, not a beginning. The dilemma lies in this: Organized force may sometimes be necessary so that government may function; but unless there is some likelihood that problems of territorial and economic adjustment, treaty revision and peaceful change will be satisfactorily solved by international action, sanctions may have the appearance of merely preserving the *status quo*. Neither stability nor change is an end in itself.

The vital necessity for international law is not to be minimized by these conclusions that some international problems are more likely to yield a solution to a political method than to a legal method. The science of international law has survived all the wars since Hugo Grotius and is on the threshold of thrilling and challenging new tasks. The international law of the future must be a law consciously constructed by the international community to serve the needs of that community. If I may borrow a phrase from my distinguished colleague, Judge Manley O. Hudson, "international legislation"—a procedure of deliberate law-making—is a more adequate means than reliance on custom or the jurisprudence of international and national tribunals for the conscious and progressive development of international law.

Perhaps a word should be said here about the nature and limitations of international law as a means to an end. The proposition that in-

ternational law should be consciously constructed to serve the needs of the international community is not based on the belief that the evils of international society can be cured by passing laws against them. The conception of international law as a series of prohibitions set against the power politics of states must be replaced by a conception which regards international law as the exemplification of the functional rules of order necessary for the attainment of specific ends. International law must be conceived of less as a body of commands which are expected to achieve their prohibitive purposes in opposition to social and political realities than as a canalization of those tendencies considered valuable in terms of social ends.

The Progressive Development of International Law a Task for the Profession

These ends are set forth in the Charter of The United Nations, and include, in addition to the maintenance of international peace and security, a reaffirmation of fundamental human rights, of the dignity and worth of the human person, of the equal rights of men and women and of nations large and small. The Charter further provides for the promotion of social progress and better standards of life in larger freedom, the promotion of full employment, and cooperation in the solution of international economic, social, health, cultural, humanitarian and legal problems. Since the Charter was drafted, international lawyers have been confronted with the urgent task of establishing international controls in the field of atomic energy.

It is the great good fortune of the international legal profession to participate, along with specialists in these social and scientific problems, in the elaboration and drafting of international instruments to achieve these ends. The task of progressively developing international law to embrace these new and vital objectives is worthy of the best talent in the profession.

Changes in the Practice of Law: Some Observations by a "Country Lawyer"

by Louis F. Jordan • of the Virginia Bar (Waynesboro)

■ What do the lawyers in the smaller cities and towns throughout the United States think about the present and future of our profession, the changes that have taken place in it, the opportunities which it offers to young men and women? Do they have points of view and experience which are not known to leaders of Bar Associations and teachers in law schools?

The *Journal* is trying to get and publish the answers to such questions. Edwin Luecke, of Wichita Falls, Texas, put some challenging questions, in our June issue (pages 585 and 586), from the point of view of the younger lawyers. In the following article, a thoughtful trial lawyer in Waynesboro, Virginia, a city of about 10,000 population, gives some angles which should help our readers to think, even in disagreeing with some of his views. He sees "a new order" in our profession. Mr. Jordan was born in Staunton, Virginia, in 1888, and attended the Fishburne Military School (Waynesboro), the University of Virginia Law School, and George Washington University Law School. He was in the life insurance business under his father, who was Washington manager of the Equitable Life Assurance Society; he ran a watercress farm, became Mayor of Basic City (now a part of Waynesboro), gained admission to the Virginia Bar in 1917, owned with his father and edited for a while the *Valley Virginian*, contributed to the old *Virginia Law Register*, finally gave up trying to combine journalism with law, and has since devoted himself to what he regards as an "enjoyable and sufficient" law practice, which has been considerably in trial work, in part in criminal cases. He is the author of *Memories of a Criminal Lawyer*. He lives in the Blue Ridge Mountain region, close to the Skyline Drive, eleven miles from his birthplace. He is a member of the Virginia Bar Association and Virginia State Bar, and has been a member of our Association since 1929.

■ If it can be said that war has changed our educational system, it can be pointed out with the same accuracy that something has changed, not only present-day law practice, but also the kind of arena the young lawyer will find as he emerges from law school with his diploma and his degree.

In a former day the legal tryo was afforded an opportunity first to dis-

port himself in the police Court and before our country magistrates, to learn the art of oratory first-hand in "barn-storming" days. He could take his own good time in the examination of witnesses, and have the help of older members of the Bar. Today it is different. But it is not different as to the desire of the seniors to help the youngsters. Whatever changes have come over the

legal profession, it can be said with pride that no profession is less jealous, none more cooperative, in lending a helping hand to the fledgling about to "try his wings" in Court.

Just how to make clear the factors which have brought about the changes in our profession and practice is not easy. To acquaint the reader with present-day trends in the practice of the criminal law, for example, reference may be made to a few books published in the past fifteen or twenty years, which dealt with lawyers, clearly depicted well-known American lawyers and their methods in the trial of criminal cases, and bring us to ask the question: Will the next twenty years produce trial lawyers who will be as well-known as Clarence Darrow, Earl Rogers, Jerry Giesler, Moman Pruiett, and others? These may not be the lawyers held out by our Bar Associations or law schools as the exemplars of the profession, but they were lawyers the public knew about and watched.

First of the books to enjoy large sales and regale the public generally was Gene Fowler's life of Bill Fallon: *The Great Mouthpiece*. Then Darrow wrote his autobiography. The Pacific Coast saw to it that its brilliant Earl Rogers should be given credit for his exploits in and about Los Angeles. Lastly, one of the most readable, *Moman Pruiett—Criminal*

Lawyer, also an autobiography, was published about a year before the death of the Oklahoma barrister who wrote it. The Rogers work, *Take The Witness*, is a valuable analysis as to how our successful trial lawyers made the cross-examination of witnesses the art it is today. Whether that art will be preserved remains questionable. The Courts are too busy with cases, and time is not left for us to engage in minute examinations, as in the by-gone days.

What Factors Produced Yesterday's Great Trial Lawyers?

What produced these great trial lawyers in criminal cases? What factors played the most important part in giving them the arena in which to make such successes that they became great actors as well as effective lawyers?

Trial of Cases Without Juries Has Changed Law Practice

Whether the layman, or any great number of our profession, will admit it, the thought is ventured that our present-day handling of trials without juries is the chief factor in bringing about a change in the practice of law. In the field of criminal procedure, this is undeniably a present-day trend. We are trying more and more cases before our judges, without the intervention of juries, than ever before in the history of American jurisprudence. Twenty or thirty years ago, the average judge would shrink from trying a question of fact; he would say to the lawyers who desired him to hear the case without a jury: "I pass on the questions of law in the case, not questions of fact. Call a jury!" Today, with Court calendars crowded, the modern judge welcomes an opportunity to save himself the tedium of sitting through days of trial work with a jury on his hands, when he can dispose of the factual questions, as well as the law, in a matter of hours.

Clarence Darrow once remarked on the thrill an advocate experienced in a crowded Court room, with a jury on hand to try the case and the atmosphere of the auditors always

favoring the successful defender of the accused. Then there is the other factor ever present on such occasion—the press—those alert scribes who are quick to sense the dramatic elements of a Court battle and to build into fame the chief actor in any contest between the State and a defendant whose liberty is at stake—especially so, when the defendant is a prominent member of society. Hence it would seem that in the Court room in full-swing, with a jury, eager audience, and the members of the press on hand to describe the contest of the arena, the trial lawyers of the past had about all it takes to create stalwart figures whose names have become well-known.

Big names have produced big cases; and such struggles in Court, with prominent parties involved and an ever ready press to recount the day-by-day play in the criminal Court, have found their way into such newspaper publicity that the central figures, the criminal lawyers, have gained marked reputations. As time passes, such cases will be aired; there will be jury trials most certainly. I am not suggesting that the jury system is passing, only that it is diminishing in importance. With this new trend has come the less frequent trial to produce big-name lawyers.

Lawyers have learned that they can win just so many cases, whether they are tried before juries or judges. It has steadily become fashionable among lawyers to save time and take a chance on what the judge will do. Because, as a rule, judges are more lenient than juries where those charged with crime are proved guilty.

Probation Systems and Suspended Sentences Have Changed the Practice

This brings us to consider a new element in the criminal case. In recent years the work of probation officers and welfare agencies in most States, and the suspended sentence employed by the judges, have saved many an offender from serving time, in either jail or penitentiary, especially where the offense is laid at the door of one who has inadvertent-



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ly fallen by the way-side and strayed unwittingly into the meshes of the criminal law. These factors enter into the equation when we consider the new order of things. Not many years ago no such system was in vogue. It was a case of win or lose, when trying a case. Hence the desperate effort on the part of the old-school lawyer to save his client from conviction, knowing that a sentence must follow an adverse verdict.

After many years' experience, the lawyer can pretty well guess whether his client is guilty and will be found so by a judge or jury if the case goes to trial. Under our modern system, the wise thing to do is size up the case before the trial time comes, plead the client guilty, and place all the facts and question of the accused's character squarely before the judge. If the case possesses merit, and the wrong-doer is what we term an inadvertent violator—that is, one who has unwittingly and without criminal intent violated a law—most judges, being very human as they are, will find the accused guilty, it is true, but will provide that the sentence be suspended on condition that the convicted one keep the peace and be of good behaviour for a given length of time. This suspended-sentence vogue, so much used today, is having a lot to do with our tendency to waive a jury trial and place the case in the hands of the judge.

To sum up: Juries are less frequently to be seen in Courtrooms; newspaper publicity is less than ever in criminal trials, except where big names figure in the news. The complexity of present day existence is such that time is a vital factor in the administration of justice; lawyers are more anxious about succeeding in the quickest way rather than play to the gallery and thrive on press publicity. They are becoming less the actors they used to be, and more the cold and calculating scientists of the law; more the surgeon with a steady scalpel, relying on scientific exactitude, rather than dramatics and the play on emotions. In fact, it is questionable whether our Courts would allow, at the present time, many of the tactics employed during the days of a Fallon or a Rogers. Darrow, of course, was in a class by himself. He was perhaps the one lawyer of all time who has become known, and who succeeded, by employing psychology in his arguments to juries. He was in a class by himself; probably there will never be another Darrow.

Many Changes Are Taking Place in Law Teaching and Practice

The machinery of present-day law teaching will be geared to our new order in the Courtroom. The student will imbibe the principles of law; he will be taught scientifically; and he will emerge from his university prepared to play the legal game with cold precision. It will be a practice void of dramatics and ballyhoo. The young lawyer will know little of oratory; his arguments will be precise and uninteresting dissertations on law and fact, before either a single judge, or before some appellate tribunal with several judges, all the way up to the Supreme Court of the United States. There will be little difference in the quality or style of his speech—it will be unimpassioned, logical, slow and in measured cadences. He will know nothing but the science of law, and the coldness of logic in speaking his piece to the Court.

Thus the criminal case of tomorrow

will be more and more a thing vastly different from its counterpart of yesterday. There is a change in this branch of law practice as distinct as the change in our way of life generally, since the recent world war; and it will grow with the years.

Not alone is the criminal Court a different place from its predecessor. The whole business of law is changing; and it might be in keeping with present trends to use this word business more frequently when we speak of the lawyer, because he is certainly more a business man, using business methods, than he was twenty or thirty years ago. That business has touched the professional man more keenly, is evident from the specialized fields into which the lawyer has entered. He is less a general practitioner like his father or grandfather, drawing deeds, looking up land titles, drafting wills, computing income taxes, or appearing before some administrative body on one of a hundred different questions; and this is true even in our less congested areas.

The "Country Lawyer" Has a Broader Life and Opportunity

The country lawyer is rapidly specializing. Indeed, the country lawyer is so unlike his brother of a decade or so ago that he is not recognizable. The country lawyer has for his clientage a territory which would surprise his metropolitan brethren. The automobile, successful farming, and the proximity of far off country homes to the fairly good-sized country centers of population comprising fifteen and twenty thousand people, has given the old country lawyer a clientage which is estimated on the basis of ten to twenty miles radius from his seat of operations. He, too, is specializing, enjoying a fair yearly income, and taking life easier than many of those who labor and compete in the great centers of population.

New York, for instance, is a city of what country lawyers call law factories. The great office buildings house firms of National reputation,

which utilize several floors for their personnel, running into several hundred to a firm. This includes, of course, the stenographers, clerks, and young lawyers who run down the authorities for the older members of the firms. Many of these old established factories have names on the doors which are but memories of long departed big-name members of the Bar. It takes years for the younger men to become members; and they will in many instances spend their entire lives working in these law factories, unheard of by the general public. Their lives will prove useful and their incomes will be lucrative. They will be counted great successes by those who know what success is in the law; but they will not be the subject of best-sellers like *The Great Mouthpiece* or Darrow's autobiography or Pruiett's book which told of the wild days before juries in Oklahoma and the great Southwest.

Incidentally, the new order of lawyers will lead more serene lives, and enjoy their old age, rather than wind up penniless as have many great trial lawyers of yore, who lived their old days in shallows and in miseries. Indeed, no life lead as were those of many great criminal lawyers, with the strain and emotional stress, to say nothing of the addiction to liquor, could end but tragically, however brilliantly.

Law Will Still Offer Opportunities for Useful Lives

We have today under the State and federal legislation, so many administrative boards that it would be impossible in this article to name them. They require lawyers to head them and lawyers to practice before them. In the fields of corporation law, tax law, interstate commerce and rate-fixing bodies, there is a vast field for specialized practice. Divorce cases are on the increase in practically every jurisdiction. Infractions of one law or another are constantly being adjudicated by a Court, a commission, a board, or some legally constituted tribunal with authority to

speak for the State or the federal government.

There is a change in practicing law. It will be of increasing tempo, and the old days of practicing law are gone forever. Most lawyers are used to this new order by now, and have accepted it as a necessary part of our present existence. It is, on the whole, a good sign and should cause no worry to the young man or woman about to consider a legal career. There will always be a need of lawyers; always *great* need for those who will specialize and become the scientists in a given branch of the profession. Not only are our law-makers chosen widely from the legal profession but our great executives are law-trained men, with a basic knowledge of law, so useful in the guidance of corporate enterprise.

Lastly, the complexity of human existence is such that one is safe in venturing the opinion that our laws will become even more intricate as time passes. In the interpretation of these laws, whether they be enacted by legislature or Congress, or by boards or other duly constituted tribunals, a vast army of law-trained men and women must be ever on the alert to step into the positions offered, guaranteeing incomes which are worth the years it takes to gain the essential knowledge for even a specialized law practice.

The Public Has Been the Gainer from Changes

The public in all this change has been the gainer. There is a growing tendency to abandon the old forms and practices indulged, as the laws

have well said, "from time immemorial." The so-called common law of hundreds of years ago is being superseded by legislative enactments in keeping with our modern civilization. The archaic documents of twenty-five or fifty years ago are supplanted by short-form documents, and the layman can go his way today feeling that the time is not far distant when the old phrase that "it would take a Philadelphia lawyer" to do this-or-that, is no longer necessary.

To the glory of the American lawyer, be it said that he is in the vanguard of this progress, this change, this new order of things. It is no idle prediction that he is working, individually and through the Bar Associations, to see that law practice will ever be honorable and modernized.

Notice of Annual Meeting of Members

American Bar Association Endowment

■ The Annual Meeting of members of American Bar Association Endowment will be held during the week of the Annual Meeting of the American Bar Association, September 22-26, 1947, at Music Hall, Cleveland, Ohio, for the following purposes:

(1) Acting upon a proposed amendment to the By-Laws, whereby in lieu of existing Article II, Section I, the following would be substituted:

"The affairs of the corporation shall be managed by a Board of ten Directors. At the annual meeting of members held in 1947 one director shall be elected to hold office for the term of one year, one for the term of two years, one for the term of three years, one for the term of

four years and two for the term of five years. After 1947 two directors shall be elected annually by the members from their own number, to hold office for the term of five years or until their successors are elected."

(2) If the amendment is adopted by a majority vote of the members present, electing one member of the Board of Directors for the term of one year, one for the term of two years, one for the term of three years, one for the term of four years and two for the term of five years.

(3) Transacting such other business as may come before the meeting.

All members of the American Bar Association are members of the Endowment.

The purpose of the proposed amendment is to increase the number of directors from five to ten. The present Board of Directors is convinced by experience that more manpower is necessary if Endowment is to do all that it ought to do for the Association.

Under the existing By-Law, the term of each director is for five years, but the terms are "staggered" so that only one director is elected each year.

The amendment will continue the same principle, so that, beginning in 1948, the terms of two directors will expire each year and two directors will be elected each year for five-year terms.

The Hearing Examiners:

Undecided Questions as to Their Selections

■ The question whether interested and qualified judges and lawyers throughout the United States shall be given an open chance to compete for appointment as Hearing Examiners under the Administrative Procedure Act is still undetermined. The U. S. Civil Service Commission has announced a July 9 hearing on draft regulations to govern the selection. Up to 350 Examiners will be chosen. As the present session of the Congress is scheduled to adjourn on July 26 to meet again in January, Senator Wiley and others are determined to assure non-political selections for judicial qualifications and freedom from bias, else the Congress may act before adjournment. Lawyers and other citizens who have views on the subject may well wire or write their Senators and Congressmen.

■ The situation is unchanged at this writing (ten days after June 11) as to the final outcome of the important issue whether the present Hearing Examiners of the administrative agencies shall be "covered in" under the Administrative Procedure Act without opening the selection to qualified and important "outsiders" and whether future vacancies shall be filled only from the staffs of the agencies.

The present Hearing Examiners are continued in their present posts until at least August 1. The Congress has indicated July 26 as its adjournment date. Proposed regulations to govern the selection of the Hearing Examiners have been drafted by the Civil Service Commission and a public hearing as to them was held by the Commission on July 9, at which our Association and other interested organizations and individuals presented their views.

Meanwhile, on June 6, Senator Alexander Wiley, of Wisconsin, Chairman of the Senate Committee on the Judiciary, gave an address

before the Federal Trial Examiners' Conference. Quoting in full his letter to Commissioner Flemming of the U. S. Civil Service Commission (May JOURNAL, pages 421-422) and the latter's reply (June issue, pages 580-581), Chairman Wiley made a forthright statement as to the objectives of the Administrative Procedure Act as to the Hearing Examiners.

Excerpts from Chairman Wiley's Talk to the Trial Examiner's Conference

"In recent years, there has been a tendency to batter down the functions of the Examiner to an 'advisory' level. I am told that in the last decades there have been *departmental 'hi-jacking'* attempts by some agencies to find substitutes for Examiners, or at least to find substitutes for portions of their functions.

"Many students of government have, however, felt that the status and the importance and the jurisdiction of the Examiner must be maintained at a high level. I am told that in 1941 The Attorney General's

Committee deplored both the use of 'anonymous reviewers' and also the practice of some agencies of making a marionette show of a hearing with the Examiner serving as a sort of puppet.

"The Administrative Procedure Act presumably removes the Examiner from agency domination in selection and places him in a prominent position in statutory hearing cases, where the Examiner is to be carefully chosen and is subject to disqualification upon the filing in good faith of a timely and sufficient affidavit of personal bias.

Are Only the Present Examiners To Have a Chance?

"All of this brings us to the question of whether or not existing Examiners should be reappointed and, secondly, how the new appointments to Examiner positions should be made. The first problem is a very immediate one, since many Examiners must be appointed in the immediate future, and the second problem is equally important because it can conceivably set an administrative pattern for decades to come.

"I don't want to be misinterpreted as even implying that existing Examiners should not have proper and adequate consideration given to their experience. In fact, it is for that very reason that so many students of the Administrative Procedure Act have contended that existing Examiners should compete with outsiders for

these appointments. The existing Examiners will, it is true, have an advantage, or presumably in most instances they will be able to produce definite measurable records of extremely pertinent experience.

"On the basis of this experience, it would appear that the hearing authorities will be able to certify to their qualifications with somewhat more certainty than they would be able to certify to the qualifications of a complete outsider. I believe that honest and conscientious Examiners will welcome competition, because it will give them the opportunity to demonstrate that there is no self-perpetuating 'inner palace guard.' It will give them an opportunity to demonstrate also that there is no perpetuation of any one dynasty of political ideology.

"I understand that about 200 Examiners will be appointed, and I understand that about 150 of the present incumbents will probably meet the so-called paper qualifications, which would mean that if the 150 are found adequate, about fifty positions will have to be filled from the ranks of outsiders."

Chairman Wiley Pursues the Subject Further

On June 20 Chairman Wiley of the Senate Committee sent a further letter to Commissioner Flemming, in which he said, in part:

Supplementing my previous correspondence and public remarks on the subject of the Hearings Examiners to be appointed under the Administrative Procedure Act, certain very disturbing allegations have been communicated to me to the effect that the Commission may pursue a course during the period when Congress may not be in session which it might not otherwise pursue were the Congress still at hand in Washington.

You will recall that you advised that the final regulations of the Commission relative to the Hearings Examiners would be promulgated to be effective on August first.

As you know, I have shared the intense concern of the American Bar Association that the Hearings Exam-

iners ultimately confirmed for the new posts might consist largely or exclusively of an entrenched "palace guard" of former Examiners and/or of individuals having an approach inimical to the welfare of private enterprise.

From your previous advice to me, I believe that you are eager to refute by action any such allegations as I have mentioned above.

I would, therefore, greatly appreciate if you would elaborate on the actions which the Commission may intend to prove that the allegations are unmerited. In the absence of such proof, many members of the Congress may feel that it will be necessary to take definitive legislative steps to insure the fulfillment of the mandate of the Administrative Procedure Act.

Examiners of the Interstate Commerce Commission Are Lauded

The Association of Interstate Commerce Commission Practitioners, the membership of which includes lawyers and non-lawyers, has sent to Commissioner Flemming of the U. S. Civil Service Commission, and to Senator Wiley and the JOURNAL, a letter concerning the Examiners of the Interstate Commerce Commission. After referring to Senator Wiley's letter to Commissioner Flemming, published on pages 421-422 of our May issue, President R. Granville Curry of that Association said, in part:

While Senator Wiley's letter appropriately emphasizes the importance of selecting men of ability, integrity, and high caliber, his comments as to the need for a sweeping change in the present personnel of Examiners and for the elimination of those with "ideological preconceptions" and Communistic views or sympathies are apt to give a gravely unjust and erroneous impression of those administrative agencies, particularly the Interstate Commerce Commission and other older agencies, which have established themselves in public confidence through long years of loyal, impartial, and distinguished service.

The Association of Interstate Commerce Commission Practitioners, which has over 3,000 members throughout the United States, is particularly concerned with the Interstate Commerce Commission. The

Examiners of that Commission have long been chosen under Civil Service regulations which have assured selection of competent men and protected the Interstate Commerce Commission from political or other interference in their selection. As a group, they have made an enviable record in performing with ability, impartiality, courtesy, and firmness the important tasks assigned to them. They have felt a laudable pride in their work, a deep sense of responsibility in making the Interstate Commerce Act serve its broad and remedial purposes, and a patriotism beyond reproach.

The Examiners of the Interstate Commerce Commission have been carefully trained over a period of years in dealing with the intricate, complex, and complicated problems arising under the Interstate Commerce Act and requiring intelligent, patient, and impartial determination on the facts and under the law, of reasonable and non-prejudicial rates, acquisitions in the public interest, new operations required by public convenience and necessity or consistent with the public interest, securities issues compatible with the public interest, reasonable returns on value, etc. They have had deeply instilled in them the basic elements of fair play in providing full opportunity to litigants to be heard. They have been a bulwark to the commission in its sixty years of service as a non-political, independent, and highly important administrative agency. It seems inconceivable that the Civil Service Commission would not give full recognition to the qualifications of these Examiners in making appointments under the Administrative Procedure Act and carrying forward its purpose to provide proper compensation for the difficult and important work which they perform.

It is not believed that Senator Wiley intended to include these able and patriotic men within the strictures of his letter. Yet in order that the record may be clear, it seems appropriate to say what is here said.

It is not believed that the experience, judicial temperament, and demonstrated impartiality, of any Examiner for any agency would be disregarded or overridden if the new Hearing Examiners under the Act were chosen in open competition for fitness and qualifications or if they were appointed by The President and confirmed by the Senate.

"Books for Lawyers"

WHY THEY BEHAVE LIKE RUSSIANS. By John Fischer. *New York: Harper & Brothers, May, 1947. \$2.75. Pages viii, 262.*

This short book will be valuable to lawyers who as leaders in their respective communities are so often asked: "What should be our attitude toward Russia?" "What does Communism really mean?"

No one, with the exception of the fourteen men who comprise the Politburo in the Kremlin, can answer those questions fully. We get at best only partial glimpses through the pages of an occasional book or featured magazine article. And first we want to know if the author is a propagandist or is trying to report fairly.

Mr. Fischer was in Russia to supervise deliveries and distribution of American shipments of goods under UNRRA. He says he was allowed to do his work of supervision without interference, although he was watched. Brooks Atkinson, Moscow correspondent of the *New York Times*, calls him "an exceptionally able reporter whose judgment is sound".

As to the Russian legal system, the author writes (page 149):

The Soviet Court is never regarded as an independent tribunal, capable of protecting the citizen against illegal acts of the government. It is merely one of the instruments, along with the police and the Red Army, which the ruling class uses to impose its will. Thus directives of the Communist Party are enforced by the Courts, whether or not they have ever been enacted into law by any formal legislative body. And the actions of the political police are, of course, never subject to any kind of judicial review. Inasmuch as the Communist Man-

ifesto challenges our law as being simply the tool of the ruling group in its class warfare, the above quotation supplies the retort direct.

And the ruling class in Russia is very small indeed. The dictatorship of the proletariat means exactly what those words imply. "The men who run it argue that it is a democratic government *for the people*" (page 76).

If we match this with Lincoln's definition, we find that it is government of the people, maybe for the people, but not by the people.

Mr. Fischer pays this tribute to the strength of Communism (page 62):

The Communist Party is probably the most efficient machine ever devised for the governing of men. It also is a tiny, privileged ruling class, marked off from the great herd it governs as sharply as any ruling class in history.

But he notices "two really serious weaknesses of the Soviet political machine" (pages 85, 86):

One of them is an overcentralization of decisions; the other is a blind inflexibility in official thinking.

During the war all of us heard a lot of talk about the enviable ability of the dictatorships to make decisions rapidly. This is undoubtedly true of the big decisions—those which may switch a whole nation on the track from peace to war. It can be argued, however, that these are the very decisions which ought *not* to be made quickly, which should be reached only after long and searching public debate. For if one of them turns out wrong, the results—as Hitler and Mussolini learned—may be fatal, and not for the dictator alone.

It is equally true, though less generally recognized, that a highly centralized government is utterly incapable of making little decisions prompt-

ly. The reluctance of small-fry bureaucrats to take on responsibility, which we have already noted, means that thousands of petty, day-to-day problems—whether to pave a twenty-mile stretch of road or when to hire an extra clerk—pile up on the desks of Higher Authority.

For this is not the sort of trouble which can be cured by efficiency experts or shrewder management. It is inherent, I believe, in the very nature of large, centralized organizations.

The Russian administration of justice, being an avowed agency of the State to carry out its will, prefers that the innocent be punished in order that the guilty may not escape. After the assassination of Stalin's close friend, Kirov, in 1934, three years of police investigation followed (page 9):

The resulting purge inevitably was tinged with panic; eventually there came an official admission that many innocents had suffered along with the guilty in the great wave of executions and imprisonments.

Any nation which employs an all-powerful secret police can take it for granted that such power eventually will be abused. (page 18).

One of the chief investigators for the Canadian Government in its recent unearthing of the work of a Russian spy ring in Canada said to me that it was hard for him to understand the lengths to which members of the ring had been willing to go, risking everything—their lives and their honor—for remote objectives they could hardly understand.

Mr. Fischer, noting the same fervor and fanaticism, writes (pages 88, 89):

The appeal of Communism, it seems to me, is essentially religious. It purports to offer not merely a political program but a road to salvation for all the world. Although its ritual is couched in materialistic terms, it demands a mystic devotion surpassing all other loyalties. Moreover—and this is the central point—it preaches an authoritarian theology. . . . the doctrine that every action—including lying, treason, and murder—is morally correct if performed in the service of The Cause.

Mr. Fischer deals sympathetically

with the real problems of the Russian people and with their historical evolution which has contributed greatly to their attitude of fear towards the outside world and to their acceptance of the form of government which they now have.

The book unquestionably is an honest effort, and to this reviewer a highly illuminating effort, to help our generation understand the great challenge which confronts us—an enigmatic, powerful, deadly serious challenge which we must meet in any event and solve if we can.

REGINALD HEBER SMITH

Boston, Massachusetts

TOTAL WAR AND THE CONSTITUTION. By Edward S. Corwin. New York: Alfred A. Knopf, 1947. \$2.50. Pages 182.

The effect of the last world conflict on our established form of government is a subject which is of interest to all lawyers and students of political science. Professor Corwin's lectures not only analyze the various constitutional problems which arose during the waging of World War II, but also give an excellent account of the factors which caused the problems to arise.

In his first lecture, Professor Corwin discusses "The War Before the War." He defines his use of the word "totality" by explaining that he uses it to mean "functional totality"; "the politically ordered participation in the war effort of all personal and social forces, the scientific, the mechanical, the commercial, the economic, the moral, the literary and artistic, and the psychological." With this definition, it is easy to understand the strain that total war places upon "society, government, and the Constitution." And even though the conflict is now ended, we have as a result of the war the atomic bomb, the control of which may cause constitutional problems not yet even contemplated.

Our "participation" in World War II began, according to Professor Corwin, when we ceased to be "neutral" and became "non-belligerent." The change was largely at the in-

stance of The President, who laid claim as "Commander-in-Chief" to many powers not previously invested in the Chief Executive. Whether these powers were constitutionally his depends upon the interpretation of Article II of the Constitution—was that Article meant to be a simple designation of office or a "fountainhead" of all The President's powers? Since the beginning of our country's status as an independent Nation, the greatest single force in determining our foreign policy has been The President. The three wars of outstanding importance prior to World War II were all the result of Presidential policies, and Congress had only a minor part in each of them. Because Congress accepted certain extraordinary acts of the wartime President without protest, the Civil War was the "prototype" of World War II, since the facts of the Civil War proved the necessity of The President's having the power to take emergency measures.

The "War before the War," according to Professor Corwin, may have begun on October 5, 1937, when President Roosevelt made his famed "quarantine speech" in Chicago. But it had definitely begun by the time of the Trade Agreements Act of 1934, which served to restrain Axis trade interests in Latin America and increase our own trade with that section of the world. Even this, however, is probably not in the immediate train of events leading to Lend-Lease, the starting point of which was an Executive Order in 1938 by which the Army was directed to turn back older weapons to private contractors, who were permitted to dispose of them abroad.

After the fall of France, large supplies of munitions were sent to England, as allowed by the Executive Order of 1938; and on September 3, 1940, it was announced that we had agreed to supply Britain with a number of destroyers in return for certain sites for naval bases in the Atlantic. This agreement, made by The President, was defended by Attorney General Jackson as flowing from the power of the Commander-

in-Chief to "dispose" the armed forces, which was construed as the power to "dispose of" them. Later, Oscar Cox, Assistant to the General Counsel of the Treasury Department, discovered an Act passed by Congress in 1892, giving power to the Secretary of War to lease property of the United States under his control. It was this statute which became the basis for the Lend-Lease Act.

After stating the above train of events, Professor Corwin lists twenty "steps" into the actual "shooting" war, beginning with the seizure of sixty-five Axis-controlled ships in American ports on March 30, 1941, and ending with the vote of the House of Representatives to repeal all the restrictive provisions of the Neutrality Act, which vote took place on November 13, 1941. From October of 1940, until the attack on Pearl Harbor, the Administration had been making plans to be carried into effect in case Japan were to attack or endanger British interests in the Far East; and Secretary of War Stimson later said that when the attack finally came, it was greeted with a sensation of relief by the Administration, since, then, the period of indecision was over.

In his second lecture, Professor Corwin discusses the "Impact of War on the Government," and begins by explaining the development of the opinion that the war power arises, not from the Constitution, but from the sovereignty of the people under the Law of Nations. The theory of Chief Justice Hughes that the war power is a single, "inherent" power guarantees the "constitutional adequacy of the war power by equating it with the full actual power of the Nation in waging war."

First among the problems of waging total war, according to Professor Corwin, was to adapt legislative power to the needs of the conflict. This was done by delegating vast discretionary powers to The President, who in turn delegated them to other agents and agencies. But even with vast delegations of power, Congress did not leave itself defenseless, for

the Lend-Lease Act, the First War Powers Act, the Emergency Price Control Act, the Stabilization Act, and the War Disputes Act, each contained provisions that made the powers they delegated subject to repeal by "concurrent resolution," which under the rules of both houses is not subject to Presidential veto.

Perhaps the most important war power exercised by the President was used in the field of labor relations. The famous "work or fight" order, although characterized as "nothing short of blackmail," was extremely effective in preventing strikes in war industry.

Professor Corwin points out that the accepted doctrine that a constitutional Act of Congress prevails over a conflicting order of the President, suffered "pretty hard usage" during World War II. An example of this is The President's demand upon the Congress, on September 7, 1942, that it repeal a certain provision of the Emergency Price Control Act of January 30, 1942. In lieu of Congress's acting, The President stated: "I shall accept the responsibility, and I will act." The President's message to Congress of that date is said to mark the "high point" in his explicit claims for Presidential prerogative, but it was followed by many other acts which are close to the doctrine of that message.

In the third lecture, Professor Corwin discusses "The Impact of War on Constitutional Rights." The modern doctrine of the effect of war on the Constitution is that war does not suspend constitutional limitations but renders them more flexible. Property rights are definitely affected during war-time, and so, too, are personal liberties.

Among the unprecedented judicial results during World War II, stated by Professor Corwin, were those which occurred in the sedition trials, the trial of Yamashita, and in the sustaining, in *Yakus v. United States*, 321 U.S. 414, of a statute which had the effect of requiring all United States Courts except the Emergency Court of Appeals to en-

force laws which might be unconstitutional.

In the fourth lecture, Professor Corwin discusses "Total Peace and the Constitution." He points out the very noticeable difference between the reception given The United Nations Charter and that given twenty-five years before to the League of Nations Covenant; and one explanation of this difference is said to be the enlarged conception of the constitutional powers of the federal Government and of the adaptability of the Constitution to problems of government. With the acceptance of the Charter, there arose many constitutional problems, such as the question of whose orders the representative of the United States on the Security Council is to take—The President's or the Congress's? And who is to determine for the United States what armed forces are to be put at the disposal of the Council? There is at least one precedent for The President's assuming the latter responsibility; namely, the "fifty-destroyer deal," referred to in the first lecture. But the theory under which he has this power is questionable, since we are confronted with the constitutional requirement that the Congress shall declare war. Perhaps, the power of The President in this regard is best sustained on the war-time precedent of delegation of the powers of Congress to The President.

Still another problem pointed out, in connection with The United Nations Charter, is the effect becoming a member of the world Organization will have on our "constitutional" sovereignty, which is defined as "the power of decision which is lodged by the Constitution within the framework of government." This sovereignty can be maintained, as long as withdrawal from the world Organization is possible, but when that is impossible, then the sovereignty of any country is of necessity merged into another, much larger sovereignty. And the result of such a merger can be compared with the consolidation which resulted from the creation of the United

States out of the Thirteen Colonies.

In his last lecture, Professor Corwin discusses "The Postwar Constitution." He finds that prior to the New Deal, the "three main pillars" of our peacetime constitutional law were: "(1) The doctrine or concept of dual federalism; (2) A certain interpretation of the doctrine of the separation of powers; (3) Judicial review." The first of these has been greatly weakened. As to the second, the Supreme Court during World War II repeatedly declined to draw any line between the Presidential and Congressional power. And judicial review as a restraint on the political branches of the National Government has become largely impaired. Professor Corwin then summarizes the results of our participation in World War II and states that our participation, "far from cutting athwart the prevalent trend in constitutional interpretation in peacetime, has simply intensified, extended and accelerated it, so that we cannot reasonably expect any pronounced reaction from most of the war's results for constitutional law."

Professor Corwin's book is scholarly and well-written, and represents a great deal of thought and understanding. It is short, but concentrated, and serves to pose many, and to answer some, of the questions concerning the future of the Constitution.
ORIE L. PHILLIPS
Denver, Colorado

PRINCIPLES OF CRIMINAL LAW. By Jerome Hall. Indianapolis: The Bobbs-Merrill Company. 1947. \$7.00. Pages x, 618.

The functions of law in civilized society are probably served more basically by the law of crimes than by any other portion of the substantive law. If the purpose of law be the preservation of order in the human community, it is clear, despite all arguments as to how much or what kind of order the law should aim at, that the criminal law is that part of the whole body of legal rules which is designed to achieve the minimum and most essential features of the orderliness which humankind re-

quires as a condition to societal existence.

Despite this basic importance, there has been less scholarly writing in English about the law of crimes than concerning any other broad field of law. There has been some writing in the law reviews, but little of it has found its way into published volumes. Writers on the larger phases of jurisprudence have taken occasional illustrations from the law of crimes, but none have systematically studied the whole field or written of it specially. Textbooks on criminal law have usually been just textbooks and nothing more; they have restated and classified the "rules", with infrequent brief inquiries as to whether the rules "worked well in practice". Philosophic and psychological questionings are so few in such books as to be negligible. And works other than textbooks have been rare. Stephens' great *History of the Criminal Law* is an outstanding exception in English legal literature, and Jerome Hall's *Law, Theft and Society* was practically the only exception until now in this country.

The study of criminology has produced much excellent and thoughtful writing, both in English and other languages, but an amazing separation has been persistently maintained between theoretical criminology and theoretical criminal law. Natural affinities well aware of each other's existence, they still seem to have met only casually. In *Theft, Law and Society*, and now again in the same author's *Principles of Criminal Law*, they are brought much closer together. Hall's current work does not merely set out the "rules" of the law of crimes, rather it raises the question "why?" as to all the rules, as well as to the differentiated "doctrines" and "principles" as they are discussed, and tries to answer the constant question in terms of social philosophy and history as well as legal theory.

In strange contrast with substantive criminal law, criminal procedure has furnished a fertile field for critical study in common law coun-

tries. In recent generations, and particularly the last few decades, demands for procedural reform have been so urgent that they have attracted the attention of articulate lawyers and laymen alike, and much useful writing has resulted. Perhaps this was partly because the need for improvement was so clear that it was easy for anyone to formulate and propose procedural changes; almost any semi-intelligent proposal for change in criminal procedure had a fifty-fifty chance of being regarded as an improvement by a large segment of society, on the theory that any change would be for the better. In fact, many changes have been written into the statutes of various American States on exactly that theory.

The rules of substantive criminal law have not been so continually and completely subject to public scrutiny as the procedural rules have been. This may have been partly because they were harder to understand; they were in many instances complex and even metaphysical, and usually not very interesting, or dramatic, as compared with the procedural rules. This does not mean that there were not frequent legislative changes in the substantive criminal law; there were, but these usually took the form of adding more and more acts to the catalog of crimes, either by creating new crimes or by expanding the definitions of the old ones. The underlying philosophy behind this phase of the law's development was the "cracker-box" conclusion that "there ought to be a law". It was not systematic, but piecemeal. The same piecemeal approach has characterized most criminal law writing during the past century.

Hall's new book presents a reasonably unified system of the common law of crimes. His analyses of the work of earlier writers are critical; and he sometimes seems almost to condemn in order to maintain his clear record of being in disagreement. Despite this, his criticisms are always constructive, whether they are conclusive or not, because they

are always based on intelligent analyses. The reader may disagree with the author, but at any rate he is given something to think about.

Many lawyers, and law students, consider a book to be good only if it furnishes a wanted citation in point or a handy formulation of a "rule" to be memorized or quoted. This book was not written for such sorry citizens, but rather for the lawyer who recognizes the criminal law as a major instrument in society's effort for effective self-control, and who is concerned with theory of law as well as with the outcome of individual cases.

ROBERT A. LEFLAR

Dean of the School of Law
University of Arkansas
Fayetteville, Arkansas

JUSTICE IS A WOMAN. By Helen Haberman. New York: Prentice-Hall, Inc. 1947. \$3.00. Pages 356.

The central figure in this sophisticated novel is a "40 Wall Street Lawyer" who is a "whiz" in the office and courtroom but a bungler in his home. The author's husband, Phillip W. Haberman, Jr., a partner in a large down-town firm, has been a member of our Association since 1939. Somehow the author has given a lot of readable realism to the professional background for her plot and themes.

At a time when Left-Wing allegiances lead many writers to portray judges and lawyers unfavorably in order to give "drama" to their psychoneuroses, it is refreshing to pick up a novel which gives a kindly picture of an able, honest lawyer. For the first time there is put into a book the many-sided contributions which many thousands of lawyers made to the war effort. Lawyers and law-trained youths were found to be the most effective managers and personnel for intelligence work; lawyers did valiant basic work in countless tasks of planning, purchasing, supply, and transportation. In and out of combat, lawyers distinguished themselves in the war; and except

(Continued on page 747)

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ Will You Come to Our Cleveland Meeting?

The preliminary announcement of the program for our Association's 1947 Annual Meeting, in Cleveland, Ohio, on September 22-26, as given elsewhere in this issue, should lead each member to consider and decide whether this gathering will be one which he should plan and arrange to attend. The prospect is that this meeting will be such that you could ill afford to miss it.

Our Association will be honored this year by the presence of the Lord Chancellor of England, Sir William Jowitt; of Chief Justice Fred M. Vinson, of the Supreme Court of the United States; of Chief Justice J. C. McRuer, of Ontario, President of the Canadian Bar Association. Other eminent jurists from other lands will add to the distinction of the gathering.

Above all this will be a *working* meeting, in the Assembly and the House of Delegates, and in the many Sections and Committees. Highly important matters are to be debated and decided. The exchange of ideas and experience as to ways and means of advancing the interests of the profession and the public will be invaluable.

This has been a year of notable upsurge and expansion in the work and spirit of our Association. This meeting will be held as the first comprehensive Survey of the Contemporary Legal Profession in America begins. Every member who can do so should exercise his right to attend and take part in the momentous decisions to be made in Cleveland.

Your decision as to attending can hardly be deferred. Hotel accommodations of the kind you would want will hardly be unlimited in quantity. Information as

to obtaining reservations is given elsewhere in this issue. Advance reservations indicate a meeting of pre-war attendance and interest.

■ Local Trial of Local Tort Claims

If you believe that the settlement or trial of tort claims against common carriers under the Federal Employers Liability Act should generally take place in the Courts of the locality where the accident took place or where the claimant lived at the time, you should read the clear statement, published elsewhere in this issue, in behalf of our Association, before a sub-committee of the House Committee on the Judiciary, and then do what you can to persuade your Senators and Congressmen to enact the remedial Jennings bill (H. R. 1639) before the present session of the Congress adjourns this month.

The orderly administration of justice and the prompt dispatch of calendared business of the Courts, federal and State, have suffered from the practice of accumulating such suits in a few large-city districts which are supposed to offer a favorable forum and "generous" juries. The trial and determination of such claims have suffered through such removals from the locality of the accident or the claimant's residence. The interests of lawyers who customarily represent tort plaintiffs or defendants in the localities have suffered from removals that deprive them of trial work which they would otherwise have done. Even the interests of claimants and plaintiffs often are disadvantaged, because of the delays through congesting the calendars of the favored districts. The prestige and good name of the profession of law as well as the Courts of justice have suffered because of the unethical practices which attend a good deal of this "shopping around".

The public and the lawyers ought to give active and prompt support to the Jennings bill. Otherwise, it may not pass at this session. Opposition to the bill seems to be organized and led by attorneys for the railroad brotherhoods, who naturally prefer to pick and choose the venue of actions for their members. Counsels of timidity or political advantage are urged, to the effect that in view of the bi-partisan passage of the Taft-Hartley bill no other legislation "aimed" at labor organizations should be passed at this session. But the Jennings bill is not "aimed" at the railroad brotherhoods or their attorneys. No labor organization, attorneys or claimants can have any vested rights to the continuance of the abuses and injustices which stem from the present provisions as to venue.

The Congress should unhesitatingly put and keep in first place the public right to the orderly administration of justice and the trial and determination of tort claims in the localities where they arise and traditionally belong.

■ Appropriations for the Courts of the United States

In the current efforts for economy in federal appropriations and for holding all branches and agencies of government closely to expenditures for which there is statutory authority, serious questions arose during the consideration of the appropriations for the federal Courts in 1948. These gave concern to judges, lawyers, and all who are familiar with the functioning and needs of the federal judicial system. Happily, through open-minded and earnest consideration by members of the Appropriations Committees of the Senate and House of Representatives, the difficulties seem likely to be overcome by legislative action before the adjournment of the Congress this month. If this prospect is fulfilled, a most serious set-back to the efficiency of the Courts will be averted.

A combination of circumstances produced the critical situation. The first issue arose when an appropriation for putting into effect the new salary system for Referees in Bankruptcy (in place of the fee system) was withheld, on the ground that the new system was devised by the Judicial Conference on such a basis as to be self-sustaining (see our June issue, pages 571-73). This omission was restored when it was made clear to the Appropriations Committee of the House that an appropriation for 1948 would nevertheless be required, to get the new system under way.

Next came the outright elimination of the appropriation of \$1,800,000 for "miscellaneous salaries", from which the secretaries and law clerks of judges were paid. This was done on the ground that there was no basic legislative authority for secretaries. Unfortunately, the appropriations for the judiciary were in the same bill with some other items of expenditure which were open to a point of order that they lacked basic legislative authority. For economy reasons, the House also reduced the appropriation for the new Court reporting system to \$800,000, which would have been about \$65,000 below the minimum which is essential to the operation of the system along the lines directed by the Judicial Conference.

Although there is no statute expressly providing that United States District Judges may have secretaries, appropriations have been made for them for about fifty years; and they are expressly recognized in Section 6 of the Administrative Office Act (28 U.S.C. 446). Late in the last Congress, each the House and the Senate passed unanimously the needed basic legislation; but there were minor differences in the two bills, and the conferees' recommendation that the House agree to the Senate amendments was not reached for action in the House.

The services of secretaries and law clerks are indispensable for the effective functioning of the District Courts. In many of the congested districts, the work of

the Courts would literally break down without them. The reduced appropriation for the Court reporting system would have crippled its flexibility and efficiency.

The actions taken in the House were of course animated by no intention to harm or handicap the federal judicial system. The threatened damage was averted when full presentations of the facts had been made. The amounts of money which would have been saved through the original actions were not large.

Lawyers and the public little realize that the federal judicial system, including the Supreme Court, the Cir-

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Members of the Advisory Board are consulted from time to time by the Board of Editors as to policies and problems of the *Journal*. They obtain, or suggest, and will at times prepare, desirable material for publication, particularly from their respective regions. Except for the monthly editorial contributed and signed by a member of the Advisory Board, none of its members is responsible, individually or collectively, for the contents of the *Journal*.

cuit Courts of Appeals, all the District Courts, and the Administrative Office—the whole judicial branch of the Government—costs the country less than \$20,000,000 a year, whereas many departments of the Executive branch have appropriations more than ten times larger. Those legislators who re-examined the matter evidently came to the wise conclusion that the reductions which could be attempted in the budget for the Courts were slight in comparison with other costs of government and were undesirable to the point of being dangerous in view of their crippling effects on the improvement of justice in our cherished judicial system. The outcome in the final appropriation bills will be watched and awaited, by friends of the Courts.

■ Two New Committees Are Created

Fulfilling an objective broached in his "induction" statement in the JOURNAL last December (pages 723-724), President Carl B. Rix has secured from the Board of Governors authority to appoint a new Committee on Lawyers' Participation as Citizens in Public Affairs. Such a Committee will of course break new ground, in the work of our Association, and will have to feel its way with considerable care, in finding its potential usefulness.

Commencement week in the universities and colleges has produced virtual agreement that the young men who returned from the wars are in a serious mood about their country and the state of the world. Those who returned to campuses and cultural courses have staged no revolts, but they appear to be in deadly earnest in trying to find out how to do something to put their country and its democratic processes on a firm, sound footing. Back from the realities of foxholes and air missions, they seem to want someone to tell them how they can best get into specific work in the unfamiliar arena of public affairs. Many of the younger lawyers have already gone into action, in their home communities and in their own way; the great majority seem still to be groping for a way to get in. Several of the foremost men of America have lately re-emphasized the need that more general and more active participation by young men and women in public affairs and in the political party of their own choice shall be assiduously encouraged. President Rix is hopeful that our Association can make a contribution to that end.

The other new Committee authorized is in a field where it may be hard to understand why our Association has not had a group at work before. It will concern itself with steps to preserve the American federal system of government and the restoration of powers and duties of the State and local governments. This is in line with a great deal of earnest thinking, in our Association and

outside it; but well-considered specific steps are essential, not mere "lip service" by public officials. Senator Pat McCarran's exploratory proposals in our June issue (page 525) may open the way; the 1948 Ross Prize Essays in this field may produce other constructive suggestions.

■ Facts as "A Political Matter"?

There was a lot of lively comment during June, by American newspapers and lawyers, when M. V. Novikov, brilliant representative of the Soviet Union on the Austrian Treaty Commission, was reported to have told his British and American colleagues that the determination of facts is a "political rather than a technical matter", as the ground for his refusal to permit the Commission's Committee of Experts to examine the "concrete facts" as to German properties claimed by Russia in Eastern Austria. He took the stand that the facts were only for "discussion" by the political representatives constituting the Commission itself. The American and British delegates had asked that the facts be found first, expertly and impartially, and then "discussed" at the political level.

The gist of the expostulations was that the core of the philosophy of the Soviet juridical system had been revealed in this frank, bald statement. In Vienna, Sir George Rendel, the British delegate, said that this was "the principle on which the celebrated people's courts that have proved so popular in countries within the Russian orbit have operated."

Without commenting here on the perhaps inconclusive contemporary evidence as to the role of fact-finding in the Soviet juridical system, can it be said that our own has been free of the concept that "facts are a political matter"? Has there been in America no disposition in recent years to put judicial or quasi-judicial fact-finding in the hands of men chosen because of their known pre-dispositions and ideologies?

Have political and policy considerations, even bias as to the facts, never entered into fact-finding by American agencies? Scores of opinions in the United States Circuit Court of Appeals read to the contrary.

Even now, is there no disposition to circumvent the selection of federal Hearing Examiners solely on the basis of their impartiality, freedom from bias, and demonstrated qualifications for the weighing of evidence and for being governed only by the fair weight of the evidence?

Is the concept that "facts are a political matter" to be inveighed against only when the avowal of it is open and offers a talking-point against a Nation whose dominant philosophies are causing grave concern?

Editorial

From a Member of Our
ADVISORY BOARD

■ The Lawyer's Part in World Organization

Since it is now evident that some form of world organization is necessary for the prevention of war, the lawyer may well ask himself what part he can and should take in such an organization. It may safely be assumed that he should take some part in it, because such an organization must be political in character and political institutions must be established and implemented by law.

At the present time, there are two obstacles to world government. One is that some of the Nations have not yet adopted the republican principle, by which all are bound by the action of representatives. Current history is demonstrating only too painfully what would be obvious anyhow, that a republic and a dictatorship cannot form an effective political union. The other obstacle is the universal spirit of nationalism, which abhors the relinquishment of external sovereignty and thereby effectively blocks any genuine political unification on an international level.

The present crisis consists in the fact that while another war would involve the destruction of Nations as well as armies because of atomic weapons, the world organization which is the only means of preventing such a war does not appear possible within the proximate future.

In the face of such a crisis, doubtless an infinitely benign Providence should be man's first source of hopefulness and inspiration. But doubtless, too, man must do his utmost.

In this task the lawyer is best qualified to lead, for he knows by experience that no man is a just judge in his own cause, and that to restrain individuals from judging and enforcing their own demands while leaving Nations free to do so is to take pains to prevent individual wars while permitting national ones.

By the invention of atomic weapons, man has set up a presumption against his own survival. His task is to rebut that presumption by showing an equal ingenuity in organizing the world for peace. That objective will never be achieved as long as Nations, possessed of the instruments of destruction, look across one another's borders and assert their sovereignty in terms of force,

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges, and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

not only inside their own borders but within the other's borders as well. A higher authority, irrevocably created, with jurisdiction over the common problems of all peoples, is essential to mutual peace. That authority will be the product of law; and if the lawyer does not take the lead in establishing it, there is little hope that it will be created in time to prevent that final disaster which now threatens to engulf the world.

HAROLD R. MCKINNON

San Francisco

Editor to Readers

Through an inexplicable but most regrettable transposition of pages in printing, our sketch of Senior Circuit Judge Evan A. Evans, in our June issue, was marred by a confusing sequence of pages. The matter appearing on page 556 should have been on page 555 and then been followed by that on page 555. Many of our readers caught and solved for themselves the transposition; others were baffled by it, our mortification is exceeded only by our regret.

Occasionally a reader says he does not like footnotes on JOURNAL articles. For ourselves, we do not seek that all articles be documented; an excess of footnotes detracts from an article, or a judicial opinion, we think. Yet those who abhor footnotes or do not read them may miss something worth while. A few days ago we saw a brief that had been filed in the Supreme Court of Arkansas on May 30, by appellees' attorneys in *Jacobs v. Sharp, et al.* Its last two pages quoted from Footnote 7 of the sketch of Judge Sibley in the April JOURNAL (page 313) and then based on it an effective closing paragraph. Two observations should be added: The judgment for the appellees was affirmed. The footnote with its fine statement of the point of view which should actuate the performance of the "high task of doing impartial justice under the law" was written for us by a gifted judge whom we rank high for his day-by-day devotion to the rule of action which he phrased for our footnote.

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In some respects, our Association may find a goal toward which to work, in the standards set by the centennial meeting of the American Medical Association in Atlantic City in June. The latter Association has more than 130,000 members; about 15,000 of them were at the meeting. Its cornerstone is more than 2,000 county, parish and district societies, in all parts of the United States. Membership in such a local organization confers membership in the AMA, which gains financial support from its 72,243 fellows. Its Councils, such as those on Medical Education and the Judicial Council (in charge of questions of professional ethics), have authority and powers. The Association's *Journal*

is published weekly, not monthly, and has a circulation of 120,000. The popular magazine *Hygeia* is also published, to reach the public. We understand that the Association, and its agencies, has a permanent salaried secretariat of about 750 people and an annual budget of more than \$1,000,000. While felicitating the AMA on its century of usefulness to the profession and the public members of the American Bar Association, which has 40,000 members, may make their own comparisons.

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The *Journal* of the Association of Interstate Commerce Commission Practitioners is reprinting in full from our May issue (page 434), with permission, John Dickinson's notable article on "The Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review".

• • •

A valued reader questions the usefulness of our practice, in reporting further action by the Association as to a matter, of giving the references (e.g., 32 A.B.A.J. 95) to the volume and page of the *JOURNAL* where the basic action was voted or initially discussed. He instances particularly the article in our May issue (page 430) as to the action of the House of Delegates as to the Connally amendment qualifying American acceptance of the jurisdiction of the World Court. He says that he tried to read the article on a train, and of course did not have with him the previous issues referred to. Doubtless others of our "brief-case readers" have similar experiences, at times; we have to say that we appreciate mightily the fact that the *JOURNAL* is read by many who can read it only at odd moments and in unplanned-for places, rather than at leisure in their libraries. It happens that the numerous references which baffled our correspondent were in the text of a Committee report which we reprinted; naturally the Committee first placed before the House of Delegates a summary of previous recommendations and actions on the subject, with the appropriate references to the *JOURNAL* in lieu of reprinting in full. But the principle and practice apply also to articles contributed and to articles of our own production. There is a problem: The *JOURNAL* is not edited and published solely for contemporary reading as a current periodical. The reports of Association Committees and the actions voted by the House of Delegates on many matters are scanned, quoted, and cited many times, by Committees of the Congress, by the authors of books and law review articles, and by men and women engaged in research. That seems to us a major usefulness of the *JOURNAL*, for the profession and the public. Association action has a *continuity*; almost every subject-matter has a background that is a part of, and important for an understanding of, what is done at a given time. We cannot republish each time the essential elements of what has gone before. We try to indicate its substance or purport, but we usually give

also the reference back to the full text, for the convenience of those researchers who otherwise would find it with difficulty, if at all. This does not make for easy reading; it doubtless vexes some of our "train readers", who leave behind them their back copies. Somehow we shall have to try to find and hold to an acceptable balance, as the *JOURNAL* is read by many sorts of readers who have a variety of interests and reasons.

• • •

Several of our contributed articles recently have referred to the difficulties due to lack of homogeneity among the representatives of members of The United Nations, the diversity in races, religions, forms of government, educational and legal systems, economic and social ideologies—whereas the men who brought into being the American Federal Union were from small and similar colonies along one seaboard. With no desire to enter that debate at this time, we refer to the difficulties experienced in The United Nations as to language and the amazing extent to which science has lessened those impediments. We watched and listened to at Lake Success the jurists who were working on plans for the progressive development of international law. The discussion took place in English, French, Russian or Spanish, as best suited the ability or the preference of the speaker. Painstaking care and constant vigilance had of course to be taken as to the parallel official texts of all proposals. Discrepancies and unintended nuances continually cropped up and had to be ironed out in good spirit, at times in etymological debates. Occasionally, a phrase or term was suggested, say in English, and tentatively accepted, during a discussion, only to find that it had no concise or idiomatic equivalent, in French or Russian, or *vice versa*. For the sake of avoiding future disagreements that the official text in one language said or implied something which was not in another, hours were spent in this quest for philological exactness. There seemed to be no "short cuts".

• • •

But in facilitating the debates, American genius and invention under the capitalistic, private-enterprise system, have made enormous strides, within the short span of time since The United Nations first met at Hunter College. In the commodious conference rooms, each representative, each member of his staff, and each accredited observer-consultant, has headphones attached to his chair. When a delegate is speaking, say in French, each auditor may make his own choice, by turning a knob to a dial number, of the language in which he will hear him. "With one ear" the auditor may hear the instantaneous translation into English or Russian or Spanish; with the "other ear", by loosening a little the pressure of the headpiece on that side, he may follow if he is proficient the mellifluous intonation of the speaker. The tempo of debate enables it to be genuine discussion. There are no more tedious delays through waiting

for the translation of a speech into several languages, as there was in San Francisco and the early days of the Security Council. All translations are contemporaneous with the utterance of the speech or remarks, and the hearer can choose the language in which he will listen.

. . .

It would be wonderful if America's free enterprise could produce devices which would overcome other aspects of the heterogeneity. The habit of thinking, working and virtually living together may produce abrasives or solvents in time—common denominators may be a better term. Barriers of language are coming down. The idea which was so manifest in San Francisco that honor to his own country requires a statesman to address an international gathering only in his native tongue seems to be losing force. Significant has been the announcement, in some commissions and councils of The United Nations, to the effect that "since we all speak and understand English, our proceedings

may best be in English, without translations". In some instances the same announcement could have been made as to French. In time it seems likely that virtually all representatives of governments will be able to speak English, French, considerable Spanish, perhaps some Russian, perhaps a little of the Scandinavian. For private and social conversations, some proficiency in French and English seems a minimum. If a representative or consultant in a conference can speak both, he and his associates seem to agree as to which shall be spoken; but the "one-language man" may find that some one is insisting on talking in another language.

A gifted Frenchman paused the other day, near the end of his remarks in French, and said, with manifest chagrin and sincerity, "Oh, I thought I was speaking in English; I had intended to do so". One wonders: In what language do these poly-lingual lawyers think?

The foregoing may be of especial interest to young men and women, in our colleges and law schools, who wish to prepare themselves for careers in international relationships. The study of languages, both the basic ancient and the modern, may become again the vogue.

Record of Actions by the Committee on the Judiciary

■ The record of the actions taken by the Association's Committee on the Judiciary under the chairmanship of John G. Buchanan of Pittsburgh, and the status of the matters in the Senate, are as follows, to June 19:

Recommended by the Association's Committee for appointment and confirmation, appointed by The President, and confirmed by the Senate:

HAROLD R. MEDINA, to be a District Judge for the Southern District of New York.

Appointed by The President, recommended by our Committee, and confirmed:

GEORGE W. FOLTA, to be a District Judge for the District of Alaska;

ROBERT E. THOMASON, to be a District Judge for the Western District of Texas;

ALBERT V. BRYAN, to be a District Judge for the Eastern District of Virginia.

Appointed by The President, recommended by our Committee, ordered to be reported favorably by the Senate Committee on the Judi-

ciary, but not yet reported to the Senate:

JOHN CASKIE COLLET, now United States District Judge for the Eastern and Western Districts of Missouri, to be a Judge of the Circuit Court of Appeals for the Eighth Circuit.

Appointed by The President, opposed by our Committee, reported favorably by the Senate Committee on the Judiciary, and not yet acted on by the Senate:

JED JOHNSON, of Oklahoma, to be a Judge of the United States Customs Court.

Appointed by The President, reported favorably by the Senate Committee on the Judiciary, recommended by our Committee, and not yet acted on by the Senate:

JOE B. DOOLEY, to be a District Judge for the Northern District of Texas.

In the case of Judge Bryan, although he had been strongly supported by the Bar of Virginia and the District of Columbia, the Senate Committee on the Judiciary would

not report his nomination for confirmation until the Association's Committee on the Judiciary had taken action.

In the case of former Congressman Johnson, it was not regarded that his service in the House of Representatives since 1927 constituted or showed sufficient experience and qualifications for judicial work.

It will be noted that each of the above nominees by The President for judicial office is a member of the present minority party, and several of them have been politically active. Neither our Association's Committee nor the Senate Committee on the Judiciary has attached importance to party membership as an element in the selection of judges who are qualified by experience and temperament to be impartial and capable judicial officers. Mr. Medina, sponsored by the local and State Bar Associations in New York and supported by our Association's Committee, was a member of the Democratic County Committee in New York County, in a judicial district preponderantly Republican.

1947 Annual Meeting:

First Announcement of Program for Cleveland

■ The main outlines of the program for the 70th Annual Meeting of our Association, to be held in Cleveland, Ohio, on September 22-26, have been announced by President Carl B. Rix. Features already scheduled are such that every member of the Association will wish to attend if he can.

Addresses are to be given by the Chief Justice of the United States, the Honorable Fred M. Vinson; the Lord Chancellor of England, Lord Jowitt; and the Chief Justice of the Supreme Court of Ontario, Canada, the Honorable Chief Justice J. C. McRuer, President of the Canadian Bar Association.

THE ASSEMBLY

First Session

Monday, September 22—10:00 A.M.

The President of the Association, presiding

Call to order

Address of Welcome

Joseph C. Hostetler, President, Cleveland Bar Association

Response

Wm. Logan Martin, Alabama

Introduction of Distinguished Guests

Annual Address of the President of the Association

Carl B. Rix, Milwaukee, Wisconsin

Opportunity for offering resolutions, pursuant to Article IV, Section 2 of the Constitution

Sixth Annual Meeting of the American Bar Association Endowment

Announcement by Secretary of vacancies, if any, in the offices of State Delegate and Assembly Delegate

Nomination and election of Assembly Delegates to fill vacancies

Nomination of Assembly Delegates, pursuant to Article IV, Section 3 of the Constitution as amended at the 1946 Annual Meeting:

One Assembly Delegate for one-year term ending with adjournment of 1948 Annual Meeting; five Assembly Delegates for two-year term ending with adjournment of 1949 Annual Meeting; and five Assembly Delegates for three-year term ending with adjournment of 1950

Annual Meeting

(Meetings of members present from States in which a vacancy exists in the office of State Delegate will be held immediately following adjournment, to fill such vacancies)

Second Session

8:30 P.M.

The President of the Association, presiding
Address by the Chief Justice of the United States

10:00 P.M.

Reception by the President of the Association to members and guests

Third Session

Wednesday, September 24—2:00 P.M.

The President of the Association, presiding

Report as to matters requiring action by the Assembly, by Chairman of the House of Delegates (or the Secretary)

Addresses

Honorable Chief Justice J. C. McRuer, Representative of the Canadian Bar Association

Honorable Alexander Wiley, United States Senator, of Wisconsin

Arthur T. Vanderbilt, Dean of the Law School, New York University

Fourth Session

Thursday, September 25—2:00 P.M.

The President of the Association, presiding

Announcement of election of Assembly Delegates, pursuant to Article IV, Section 3, of the Constitution as amended

Presentation of awards of merit to two State Bar Associations and two local Bar Associations

Presentation of Winner of Ross Bequest Award

Amendments to the Constitution and By-Laws of the Association

Open Forum—Report of the Resolutions Committee

Statement concerning American Law Institute

Report as to matters requiring action by the Assembly

Annual Dinner

7:30 P.M.

The President of the Association, presiding
 Presentation of American Bar Association Medal
 Acceptance
 Address by the Lord Chancellor of England

Fifth Session

Friday, September 26

(Immediately following adjournment of final session
 of House of Delegates)

The President of the Association, presiding
 Report of action upon resolutions previously adopted
 by the Assembly, by Chairman of the House of Delegates
 Action by the Assembly upon any resolutions previously
 adopted by the Assembly but disapproved or modified
 by the House
 Unfinished business
 New business
 Presentation of new officers and members of the Board
 of Governors
 Remarks by the Incoming President
 Adjournment

HOUSE OF DELEGATES

The House of Delegates will meet promptly at 2:00
 P.M. Monday, September 22; 9:30 A.M. Wednesday,
 September 24; 9:30 A.M. Thursday, September 25; and
 9:30 A.M. Friday, September 26, for the consideration
 of reports and recommendations of Sections and Com-
 mittees, and other business which may come before it.

The Calendar of the sessions of the House of Dele-
 gates will be printed in the Final Program for the An-
 nual Meeting, and a final Calendar containing the text
 of all available resolutions to come to the attention of
 the House will be distributed at the first session.

Tentative Schedule of Committee and Section Meetings**Saturday, September 20****Section Council Meetings—**

Morning: Junior Bar Conference (Council)
 Afternoon: Junior Bar Conference (Council)
 Legal Education and Admissions to the
 Bar (Council)
 Patent, Trade-Mark and Copyright Law
 (Council)
 Taxation (Council)

Sunday, September 21**Section Meetings—**

Morning: Corporation, Banking and Mercantile
 Law (Council)

Junior Bar Conference (Breakfast)
 Legal Education and Admissions to the
 Bar (Council)
 Patent, Trade-Mark and Copyright Law
 Taxation

Luncheon Meetings—

Noon: Insurance Law (Council)
 Junior Bar Conference
 Taxation

Section Meetings—

Afternoon: Bar Activities (Conference Association
 Secretaries)
 Corporation, Banking and Mercantile
 Law (Council)
 Insurance Law (Council)
 Junior Bar Conference
 Legal Education and Admissions to the
 Bar (Council)
 Patent, Trade-Mark and Copyright Law
 Taxation

Monday, September 22**Luncheon Meetings—**

Noon: International Association for the Pro-
 tection of Industrial Property
 Real Property, Probate and Trust Law
 (Council)

Section Meetings—

Afternoon: Administrative Law
 Joint meeting of the Sections
 of Bar Activities, Criminal Law,
 Judicial Administration and the
 Committee on Improving the
 Administration of Justice
 Corporation, Banking and Mercantile
 Law
 Insurance Law
 International and Comparative Law
 Junior Bar Conference (Committee
 Meetings, 2 and 4 P.M.)
 Municipal Law
 Patent, Trade-Mark and Copyright Law
 Public Utility Law
 Real Property, Probate and Trust Law
 Taxation

Tuesday, September 23**Section Meetings—**

Morning: Bar Activities
 Corporation, Banking and Mercantile
 Law
 Insurance Law (Three Round Tables)
 International and Comparative Law
 Judicial Administration
 Junior Bar Conference

Labor Relations Law
National Conference of Bar Examiners
Mineral Law
Municipal Law
Patent, Trade-Mark and Copyright Law
Public Utility Law
Real Property, Probate and Trust Law
Taxation

Section Luncheons—

Noon: International and Comparative Law and
Junior Bar Conference
Mineral Law

Section Meetings—

Afternoon: Bar Activities
Corporation, Banking and Mercantile
Law
Criminal Law
Insurance Law (Three Round Tables)
International and Comparative Law
Judicial Administration
Labor Relations Law
Legal Education and Admissions to the
Bar

Mineral Law
Municipal Law
Patent, Trade-Mark and Copyright Law
Public Utility Law
Real Property, Probate and Trust Law
Taxation

Section Dinners—

Evening: Corporation, Banking and Mercantile
Law
Insurance Law
Junior Bar Conference
Patent, Trade-Mark and Copyright Law
Public Utility Law
Real Property, Probate and Trust Law

Wednesday, September 24

Section and Committee Meetings—

Morning: Administrative Law
Aeronautical Law
Criminal Law
Insurance Law
Taxation (Round Tables)

Section Dinner—

Judicial Administration

Present World Court Gets First Case

■ Nearly two years after the improved statute of the World Court was made effective and more than a year after the members of the Court were elected, the International Court of Justice has formally received its first case, from among the many disputes that have flared between Nations and have been difficult of solution at the political level. The British Government has asked the Court for a judgment against Albania for the destruction of two British destroyers by mines in the Corfu Channel last October 22.

The British submission to the Registrar of the Court at The Hague states that it is made pursuant to the action of the Security Council of The United Nations, which voted

on April 9 to refer the matter to the Court. The Council had debated the matter intermittently for several weeks, and the Soviet Union had vetoed a resolution which found the Albanian Government indirectly responsible for the Corfu disaster, in which forty-four men of the British Navy lost their lives.

Whether the Tirana Government will appear before the Court is not known at Lake Success. Albania is not a member of the UNO, despite Russian efforts for its admission. It was permitted to take part in the discussion in the Security Council, without a vote, on the condition that it would accept a decision of the Court. The British position is

that the Council's decision to send the case to the Court binds Albania to respond, but a default judgment will be sought if there is no appearance. If the guilt or negligence of Albania is found, the Court will be asked then to adjudge reparations and compensation to the families of the seamen.

Thus the calendar of the World Court is no longer blank, but the habit of submitting international legal disputes to the impartial arbitrament of the Court has not been established, among the Governments which are in power in most of the world. When the Corfu case will be heard by the Court has not been announced.

American Law Institute:

Annual Meeting—Plans for Work in New Fields

■ The twenty-fourth Annual Meeting of the American Law Institute was held in Washington, on June 5-7, after sessions in Philadelphia for five wartime years. Plans for new work by this important component of the organized profession of law were uppermost in the sessions, along with completion of the tasks on which it has been engaged. The membership acted on drafts of proposed amendments of the Restatement and on parts of the proposed Commercial Code, a joint enterprise of the Institute and the National Conference of Commissioners on Uniform State Laws, which acts for our Association in such matters. The instances of the quotation or citation of the Restatement, in the opinions of Courts, now total about 14,000.

■ This "cross-roads" meeting of the Institute brought the regretted retirement of beloved officers and leaders, as well as an extended consideration of policies and work. Dean William Draper Lewis, whose vision and initiative were motivating influences in the formation of the Institute, resigned as its Director, the post he has held since the organization in 1923. His retirement was reluctantly accepted. George Wharton Pepper, inspiring President for eleven years, relinquished that office but consented to become Chairman of the Council, in his 81st year. The new President is Harrison Tweed, of New York, who is also President of the Association of the Bar of the City of New York, Chairman of our

Association's Committee on Legal Aid Work, and a Director of the Legal Aid Society of New York.

John G. Buchanan, of Pittsburgh, and William A. Schnader, of Philadelphia, were elected as Vice Presidents. Mr. Buchanan formerly was President of the Pennsylvania and the Allegheny County Bar Associations. Mr. Schnader is a former Attorney General of Pennsylvania and a past President of the National Conference of Commissioners on Uniform State Laws. Both have long been active in our Association.

The new Director is Judge Herbert F. Goodrich, of the United States Circuit Court of Appeals for the Third Circuit, formerly Dean of the University of Pennsylvania Law School. He has been for some years the Assistant Director of the Institute and is in a splendid position to carry on in succession to Dean Lewis.

Elected to serve on the Council were: Fletcher Andrews, Acting Dean of the Western Reserve Law School; John G. Buchanan, Pittsburgh; Howard F. Burns, Cleveland; Norris Darrell, New York City; William Dean Embree, New York City; Albert J. Harno, Dean of University of Illinois Law School; Earl G. Harrison, Dean of the University of Pennsylvania Law School; Monte M. Lemann, New Orleans; William Draper Lewis, Philadelphia; Judge Henry T. Lummus, Boston; William L. Marbury, Baltimore; George Wharton Pepper, Philadelphia; Judge Orie L. Phillips, Denver;

Frederick W. G. Ribble, Dean of University of Virginia Law School; William A. Schnader, Philadelphia; Austin W. Scott, Harvard Law School; Harry S. Shulman, Yale Law School; Reginald Heber Smith, Boston; Robert B. Tunstall, Norfolk; Judge John D. Wickhem, Madison, Wisconsin, and Judge Charles E. Wyzanski, Jr., Boston.

Future Activities of the Institute Are Canvassed

As soon as the new Director had been installed, Judge Learned Hand and he told the members about some possible future activities of the Institute. These included restatement of subjects not previously dealt with; post-admission legal education; the drafting of a Federal Income Tax Code; work on a code dealing with the various types of business associations; revision of the patent laws in light of the operation of a patent system in an highly industrialized economy; study of phases of criminal law, including a restatement of substantive criminal law; a critical study of legal rules in light of contemporary values; and aiding, if called upon, in the statement and codification of international law.

It was emphasized that if the Institute undertakes any of these projects, full cooperation with other interested and competent groups will be necessary to assure success. In some of these projects, such as those as to taxation and patents, the technical and non-legal problems would be

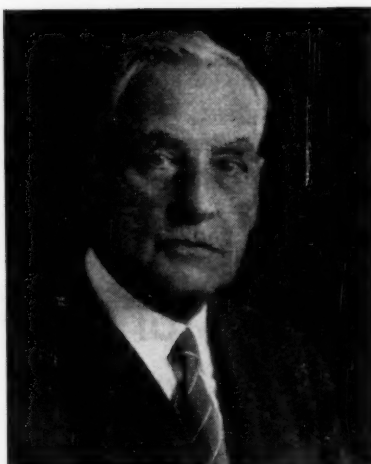
left to non-legal specialists in these fields, such as economists or industrial experts. The Institute would deal only with the legal phases of these subjects. In the taxation project, the Institute would not make recommendations on such matters as rates, but would concern itself, for example, with such problems as are raised by the *Clifford* case, with a view to determining a test by which taxpayers could reasonably foretell the tax consequences of a *Clifford*-type transaction and by which the Government would not be deprived of revenues by the mere form of such a transaction.

None of the projects, the members were told, had then materialized but the Institute could be hopeful that some of them would become definite in the near future. The members authorized the Council to commit the Institute to undertake such of the projects as it deems desirable, should occasion arise before the next meeting.

The members approved a number of changes in the By-Laws of the Institute. The limit on total membership was raised from 850 to 1200. The Council was enlarged from thirty-three to forty-two members. These changes will permit an expansion of the Institute and its governing body, in anticipation of undertaking some of the new activities proposed. Another amendment authorized an increase in the annual dues from \$10 to \$15 a year.

Amendments Approved To Keep the Restatement Up-to-date

The first two volumes of the Restatement of Contracts were completed in 1932. Also completed in the 1930's were Agency, Conflict of Laws, the first two volumes of Property, Restitution, four volumes of Torts, and two volumes of Trusts. Since then there have been, through Court decisions, significant developments in these subjects. To keep the Restatement up-to-date, the Executive Council had directed that arrangements be made for a Supplement to the Restatement, to embody amendments to the text of the sec-

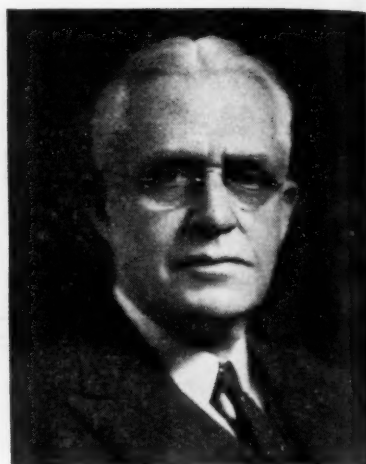


GEORGE WHARTON PEPPER

tions, as well as comments and illustrations made desirable by the development of the law since the various volumes as promulgated by the Institute were completed. The work resulting from this resolution was submitted as final drafts of amendments.

One class of the amendments considered were amendments made necessary by changes in the decisional law. In Conflict of Laws, for which Judge Herbert F. Goodrich was the Reporter, a number of amendments to the blackletter sections were made to reflect decisions of the Supreme Court in *Williams v. North Carolina*, 317 U. S. 287 (1942) which dealt with jurisdiction to divorce; in the field of workmen's compensation awards; in *Milwaukee County v. M. E. White Co.*, 296 U. S. 268 (1935), which held that a judgment, even though it arises under the revenue laws, must be given full faith and credit; and in res judicata and jurisdictional fact problems. The volume on Judgments also was changed to accord with the *Williams* case, although most of the modifications which were recommended by the Reporter, Judge Albert B. Maris, take account of recent amendments to the Federal Rules of Civil Procedure.

Professor Richard R. Powell, in reporting on the proposed revisions



WILLIAM DRAPER LEWIS

to the four volumes on Property, stated that 85 per cent of the cases decided since this Restatement have been in accord with it. The remaining 15 per cent were divergent in part and in part dealt with fact situations not thought of when the Restatement was being prepared. Most of the changes he proposed were of the latter origin. The change in the first two volumes of Torts which evoked the most comment provided that one who, without a privilege to do so, intentionally causes severe emotional distress to another is liable for such emotional distress and for bodily harm resulting from it. The Reporter, Laurence H. Eldredge, noted that cases since 1934 have established that interest in freedom from severe emotional distress is protected against intentional invasion and that the change was necessary to give an accurate Restatement of the present American law. The change was approved by the members.

Integration and Cross-References in the Restatements

Other amendments of a similar nature were made to conform the texts to the developments. A third category of amendments does not change the law as it is given in the Restatement but clarifies its application to matters recently the subject of litigation. Most of the amendments proposed and adopted were of this



HARRISON TWEED



HERBERT F. GOODRICH

type. The amendment process also afforded an opportunity fully to integrate, and to insert cross-references to, all of the volumes of the Restatement—an opportunity not previously available, since the various volumes of the Restatement were prepared at different times. A number of changes were made in the Restatement on Trusts for this reason, by the Reporter, Professor Austin W. Scott. Most of them conformed the volumes on Trusts to those on Property and Restitution. Additional changes were agreed upon to conform the material on Trusts to the Uniform Principal and Income Act and Regulation F of the Federal Reserve Board. The other subjects considered for amendments and their Reporters were Contracts—Professor Samuel Williston, and Restitution—Professor Edward S. Thurston.

The amendments to the Restatement approved at the meeting will be in a volume to be published as a Supplement to the Restatement. This volume will also include additional instances of the citation of the Restatement by the Courts. As of April 1, 1947, these had reached a total of 13,924.

Work on Parts of the Commercial Code Is Advanced

A major part of the time of the meeting was devoted to discussion of parts of the proposed Commercial Code of

Law for the United States. Supervision of the work is under a Joint Editorial Board composed of Messrs. John C. Pryor, William A. Schnader, Harrison Tweed, with Judge Goodrich as chairman. Professor Karl N. Llewellyn, of the Columbia University Law School, is the Chief Reporter. The parts of the Code considered at this meeting were Article III on Commercial Paper or Negotiable Instruments, Chapter I on Letters of Credit, Article IV on Bank Collections—Bank Operations and Foreign Banking, and Article V on Investment Instruments.

The draft on Commercial Paper was presented to the Institute members by William L. Prosser, the Reporter. An earlier draft of this part had been submitted to the 1946 meeting of the Institute and to a meeting of the Commissioners on Uniform State Laws in Philadelphia last October. The draft has been revised in light of the discussion at those meetings. Article III as submitted covers most of the original Negotiable Instruments Law except the sections on Acceptance for Honor, and Payment for Honor, which were deleted because these practices are now obsolete; the sections on Bills in a Set, to be covered by the sections on Foreign Banking now in preparation; and the sections on Liability of Parties and parts of "Miscellaneous", yet to be completed.

Discussion of Sections Involving Disputed Questions of Policy

Particular attention was devoted by the membership to a number of sections involving highly-disputed questions of policy. These were the sections on instruments payable at a bank, the necessity for consideration, discharge by certification of a check, the special indorsement of an instrument payable to bearer, holders "in due course", notice to the purchaser—as to fiduciaries, effect of waiver clauses, date of presentment of a check, protest, payment to the holder with notice of claim of a third person, and instruments not payable to order or bearer.

The Article on Foreign Banking, according to its Reporters, Professor Llewellyn and Friedrich Kessler, is intended ultimately to cover Foreign Remittances, which for the most part are typically in the area of petty transactions; the transfer of large "clean" credits of the sort which commonly take the form of one banker's direction to another to "hold at the disposal of" a named party a large sum, followed by notification to the named party that such a credit is in fact at his disposal; and the regulation of book-keeping practices in international banking which vary from domestic practices and which unless specially regulated are likely to mislead Courts as to the true intent of the transaction involved. Chapter I on Letters of Credit was submitted as a first and tentative draft and as subject to future revisions.

Miss Soia Mentschikoff, the Associate Chief Reporter of the Commercial Code, was the Reporter on Article V dealing with Investment Instruments. This also was submitted as a first and tentative draft. Included in it is corporate paper—corporate bonds and stock certificates—which has been removed from the scope of the Negotiable Instruments Law. Secured paper, which it was thought at first might be included in this Article, is expected to be covered separately under an article dealing with secured commercial paper.

The drafts of the parts of the Commercial Code discussed at the 1947 meeting are to be modified in accordance with the suggestions made by the members and further completed by the Reporters and their Advisers. They will be submitted again to the Institute membership.

The Usual Agreeable Features of the 1947 Meeting

The meeting included its usual agreeable features in addition to the working sessions. The first event was the Wednesday evening reception at the Hotel Mayflower. At the opening session, Associate Justice Harold H. Burton of the Supreme Court spoke

as to the history of the Court. On Thursday afternoon, the members and guests of the Institute were tendered a reception by the British Minister and Lady Balfour, on the lawns and in the gardens of the British Embassy.

The Annual Dinner on Friday evening was again a relaxed and altogether delightful occasion. President George Wharton Pepper presided in the inimitable fashion which puts him first among American Toastmasters. The "abdication" of "King George II"—who succeeded "King George I" (the late George W. Wickersham)—and the "Coronation" of Harrison Tweed as "King

Henry I", was staged with the "props" of a crown, scepter and robe, in a manner which was a masterpiece of the toastmaster's art, wit, and histrionic skill. President Tweed spoke earnestly in response, and was hopeful as to the Institute's future. Judge Learned Hand gave a short talk which stirred the memories and inspired the purposes of his audience. The events of the meeting, culminating at the dinner, gave grounds for hope and virtual assurance that the devoted services and diligent leadership of Messrs. Pepper and Lewis are not lost to the Institute by their retirement from the offices which they have held.

Conference Held in the Field of Commerce

■ Another of the many current activities of our Association was reflected in the dinner conference with members of the Congress and others, conducted at the Metropolitan Club in Washington on June 3, under the auspices of the Association's Committee on Commerce, to discuss informally some of the problems affecting interstate and foreign commerce.

The following members of Congress were present:

Senator Alexander Wiley, Chairman, Senate Judiciary Committee;
Congressmen: Earl C. Michener, Chairman, House Judiciary Committee; John W. Gwynne, Member, House Judiciary Committee; Albert L. Reeves, Member, House Judiciary Committee; Sam Hobbs, Member, House Judiciary Committee; Clarence F. Lea, Member, House Interstate and Foreign Commerce Committee; Ralph E. Church, Member, House Appropriations Committee; Wm. G. Stratton, Member, House Banking and Currency Committee; Robert J. Twyman, Member, House Post Office and Civil Service Committee.

Lowell B. Mason, member of the Federal Trade Commission, attended. Carl B. Rix, President, and Walter M. Bastian, Treasurer, represented the Association. Karl D. Loss, George Maurice Morris, past President of

our Association, and Jesse Smith, all of the District of Columbia, were the local Committee on Arrangements. Edward W. Allen of Seattle, Harold J. Gallagher of New York, and Benjamin Wham of Chicago, Chairman, were present from our Association's Committee.

In opening the discussion hour, Chairman Wham outlined three topics which had been assigned to the Association Committee by the House of Delegates: The rapid expansion of federal control due in part to the expanding definition of "interstate commerce" and the desirability of returning some part of such control to the States; a re-appraisal of the Anti-Trust Acts and the methods of enforcement, and the suggesting of methods of encouraging commerce while preserving competition and freedom of enterprise; and the proposed charter for an International Trade Organization, discussed in Mr. Wham's article in our June issue (page 599).

Commissioner Mason outlined informally his plan for industry-wide conferences between the Commission and industries, to take the place of hit-and-miss prosecutions in so far as possible and to encourage better understanding of the laws and better cooperation between industries and the Commission.

It was pointed out that the Department of Justice had announced formation of a Merger Unit to offer a consultative service in advance of purposed mergers. A lively discussion of the attitude of the federal Government toward business ensued. Congressmen Michener, Gwynne and others told of hearings before the House Judiciary Committee on the Kefauver Bill to prevent the sale of assets by a corporation where the sale of its stock is now prohibited by the Clayton Act. It was noted that the Government's sometime argument that Big Business is taking over Little Business is in error since the total number of business firms on December 31, 1946, was 3,644,600—an increase of 337,500 since January 1, 1940.

Congressman Stratton told of the current hearings before the Banking and Currency Committee on Government corporations.

Senator Wiley and others pointed out that the traditional policy of this country favors freedom of private enterprise but that the atomic bomb and allied discoveries and inventions have tended to make it necessary to give a monopoly control of interests and production in situations where the safety of our country may be involved.

Letters to the Editors

An Index of Legal Periodicals Is Available

To the Editors:

Your May issue (Vol. 33, page 510) contained a suggestion from William A. Challener, Jr., of Pittsburgh, Pennsylvania, to the effect that the JOURNAL should publish a complete index of all legal periodicals similar to that furnished by the American Medical Association.

The American Association of Law Libraries does supply to its members an Index to Legal Periodicals, in monthly cumulative parts and in annual volumes, which I have found to be the most complete index of its kind. That publication does not contain reprints or digests, but does catalogue every leading article, comment, or case discussion appearing in the various law reviews, as well as providing a listing for all book reviews.

While it may not be made available to individual members of the Bar, I am sure that Mr. Challener will find the publication referred to on the shelves of the Bar Association libraries in Pittsburgh. Whether the JOURNAL should duplicate the effort is a matter on which I do not feel myself competent to comment.

WILLIAM F. ZACHARIAS

Chicago-Kent
College of Law

Specific Suggestions for Shortening Appellate Court Opinions

To the Editors:

With reference to Judge Clarence M. Hanson's article on "Judicial Administration: The Avalanche of Appellate Court Opinions" in your May issue (page 426), may I offer the following suggestions:

The first burden of simplifying the "opinion" in the interests of brevity should be placed upon the "officers of the Court" who are the ones directly concerned in arriving

at the correct answer.

1. Appellant and respondent should agree upon a summary of the pertinent facts involved in the appeal, instead of each telling his own story and leaving it to the Court to determine anew what facts are pertinent.

2. They should also agree on principles of law relating to the pertinent facts, but which are not in issue, and thereby specifically isolate issues of law or issues of application of law (to answer the needs discussed on your page 429, column 3, paragraph 2).

3. The appellant's brief should state the issues of law if more than one, and the issues of applicability of established principles of law. Each issue briefly stated, should be numbered and require of the appellate Court a "yes" or "no" (unless Item 4 below applies). It may be necessary to have a judge, law clerk, or other representative of the Court, act as "moderator" to assist the attorneys in reaching an amicable statement of the problem.

4. If the attorneys cannot eventually with the aid of such assistance as may be provided phrase any of the disputed points in such a "yes-no" fashion, they should so certify and put the question as a new principle.

5. The appellate Court should then answer all questions, by number, "yes" or "no"; and in the event it is felt a "yes" or "no" will not suffice, it should make such additional remarks in the conventional form and answer other questions directly certified as new principles.

L. NORMAN TISCHLER
Brooklyn, New York

More as to "What Is the Matter with the Law Schools"

To the Editors:

On an editorial page of your May

issue (page 470) I find a contributed editorial by Phil Stone of your Advisory Board entitled "What Is the Matter With Our Law Schools?" This is a subject about which I have reflected over the years. Like Mr. Stone, I do not know the answer, but I can add my bit of speculation.

Mr. Stone believes that there is more truth than jest in the saying: "The A students become teachers of law, the B students become judges and the C students become practicing lawyers."

My own observation does not prove the point. I recall no law student of my vintage who became either a law teacher or a judge, be he A, B or C. I do remember one shining example of a student who declined the job of secretary or clerk to a judge or justice, as well as certain big-city positions, to become immediately a practicing lawyer.

Mr. Stone's concern is whether the A-students are fitted for "lawyering". My line of speculation is whether the best method is used in the selection of A-students. Perhaps I am being partially critical of myself, for those A's which I received during the course of my legal education; but it seemed to me that in my generation there was a tendency to grade on the basis of the law teacher's pet economic, social, political and other views, rather than on the basis of legal ability or scholarship—pretty phrases in the Dean's annual report to the contrary.

Mr. Stone believes that high-stand men nowadays are tough-minded. "They can and do criticize bad laws, unsound decisions . . ." I wonder if that liberty extends to their relations with their teachers. The servile student of today may breed the dictatorial professor of tomorrow.

To point out, if it could be proved, that the ten best legal positions in the country are held by the ten best students in the leading law schools would be no answer. The question would be whether these positions should be filled by ten better men.

I do not, of course, subscribe to the generalization of the cynical student who said: "Anyone can make the law review who caters to the idiosyncrasies of his teachers, and no one can make it who does not". But there may be more truth in it than in the "prevalent jest" quoted in Mr. Stone's interesting article.

What is the solution? I do not know, although it has occurred to me that law teachers might act only as teachers and perhaps prepare the questions for examinations, but that the grading be done entirely by impartial persons and not revised by the teacher. In this way the personal element would be removed.

I am unable to say to what extent the outlined procedure is practiced today. In my day it was slanted at by one or two teachers, who, graded by number, but I believe they used other factors also. It seems to me that to separate teachers and markers is a step in the right direction.

GEORGE L. BRAIN

Rockland County
New York

Failing To Read the Proposed Administrative Practitioners' Act

To the Editors:

From an examination of the proposed law to be known as The Administrative Practitioners Act, it appears to me that there is a movement under way to establish a precedent which is contrary to all of the principles as well as years of usage in this country and other countries, and that is to permit representation before judicial and quasi-judicial bodies by laymen. In other words, this bill appears to be an attempt to establish a Bar of laymen as distinguished from lawyers.

It has always been my opinion that only a person well-grounded in the study of law and legal procedure is qualified to represent a lay person before any administrative body sitting in a judicial capacity. A practice has grown up in this country which permits laymen to appear in a representative capacity before administrative boards of the federal government and of many of the States; and I have often come across

injustices done to laymen who are represented by other laymen, because of the inability of such "lay-lawyers" to properly interpret or analyze the law concerning the case, to bring out the necessary and pertinent facts, and particularly to build a record for appeal.

This bill is a continuance of such policy and, every available means in the hands of lawyers and legal associations should be used to defeat it, not because of selfish motives, but because lawyers appreciate the damage which can result from the practice of permitting laymen to act as lawyers.

The dangers of this proposed bill should be brought to the attention of the members of Congress through the various Bar Associations in this country, to the end that it shall not become a part of the law of this country.

LAURENCE SEMEL

Master in Chancery
Newark, New Jersey

Editors' Note: To receive such a communication is discouraging to your Editors. The full text of the proposed Administrative Practitioners' Act was published in our April issue (pages 307-309), with an explanation of it. The bill is in truth the antithesis of all that our correspondent condemns. It is being stoutly opposed because it would be a substantial step in the direction which Mr. Semel says he favors. The bill *does not* "establish a Bar of laymen as distinguished from lawyers". In the first place, it puts lawyers in a preferred class, as they should be, by providing that they may obtain one certificate of right to practice before agencies, and may get this as of right, from the United States District Court in their State. In the second place, the bill *does not* "permit representation before judicial and quasi-judicial bodies by laymen". On the contrary, it *excludes* laymen from appearing in a representative capacity in contested proceedings before agencies (those subject to Sections 7 and 8 of the Administrative Procedure Act). In the third place, the bill subjects practitioners before

agencies to standards of ethics, discipline, revocation of right. Because the proposed Act would do these things, it is being vigorously, and thus far effectively, opposed by organizations of accountants and other laymen who look on the bill as encroaching on opportunities by which they now profit.

The bill does not go very far in that direction, not as far as some of our members would like to see it go, but it goes far enough to arouse lively opposition from lay practitioners. On the whole, we believe that they are wrong in objecting to and resisting the moderate provisions of the bill; but the *lay practitioners* in any event know that the bill is not at all open to the objections urged by our correspondent.

So the bill is opposed by lay practitioners who evidently think that any remedial step goes too far. Many lawyers appear indifferent to it because it does not go far enough. And some oppose it on grounds which indicate that they have not read it. So it evidently is a sound, middle-ground bill.

We can only recommend to Mr. Semel and to others a careful reading of the text of the Association bills which we publish.

Further as to "Natural Law"

To the Editors:

In your June issue (page 631) Judge Stanley Milledge pointed out that the natural law philosophy defended by me in "The Higher Law" (33 A.B.A.J. 106; February, 1947) had been criticized by Justice Holmes. He quoted Justice Holmes as saying: "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere".

Natural law, or the first principle of law, is that man is obliged to seek the common good; that is, that he must harm no one, do good to others and render to each his own. The validity of this principle is not disposed of by the mere assertion that

it is naive or familiar. On the contrary, experience shows that it is inherent in the human conscience.

Judge Milledge next quoted the following from Holmes: "Now when we come to our attitude toward the universe I do not see any rational ground for demanding the superlative—for being dissatisfied unless we are assured that our truth is cosmic truth, if there is such a thing—that the ultimates of a little creature on this little earth are the last word of the unimaginable whole—Why should we employ the energy that is furnished to us by the cosmos to defy

it and shake our fist at the sky? It seems to me silly." If Holmes meant that we do not know all the truth in the cosmos he was of course right. But if he meant that we do not know anything which is true, then it was he who was demanding the superlative, because there are others who are less chary of the validity of human reason.

Holmes's criticism of the natural law stemmed from his philosophy of man, which really made a philosophy of law impossible. He said he saw no reason for attributing to man a significance differing in

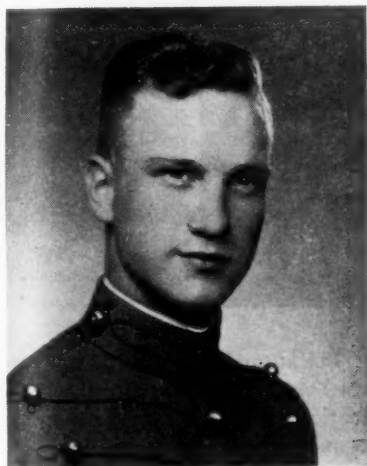
kind from that which belongs to a baboon or a grain of sand, and that he did not believe man always is an end in himself or that his dignity must be respected. Therefore he said that force was the *ultima ratio*. Upon such a philosophy, no jurisprudence of any kind could be erected.

I appreciate Judge Milledge's reference to my own article as sincere, and I fully reciprocate that feeling. I wonder, however, if he would share Justice Holmes's philosophy if he should consider it from its roots upward.

H. R. MCKINNON

San Francisco, California

Cadet Reese of Tampa Receives Association's 1947 Award for Law Course at West Point



JOHN BROOKS REESE

■ Cadet John Brooks Reese, of the Class of 1947 at the United States Military Academy, has been awarded for this year the prize given by our Association to the cadet who stands first in his class in the Law Course at West Point. The purpose of the prize and the award is to encourage prospective Army officers to acquire a thorough grounding in the Constitution and laws of their country.

Young Reese was born on June 12, 1924, at Charlotte, North Carolina, the son of Mr. and Mrs. P. W. Reese. His father, who is associated

with the Atlantic Coast Line, moved the family to Tampa, Florida, when John was two years old. Reese was graduated from Plant High School in Tampa and had completed a year and a half of a pre-medical course at Tampa University before he was inducted into the Army in 1942. In high school he had been prominent as Associate Editor of the School Year Book, and was a member of the Thespian (a dramatic society) as well as of the National Honor Society. In college he was elected to the Phi Society of Phi Beta Kappa. He received his preliminary and basic training at Camp Hood, Texas, and the following Spring was moved overseas with the 2642nd Armored Battalion (attached to the 2nd Armored Division), with which he saw combat in the Spring phase of the North African campaign.

Successful in a series of competitive examinations for appointment to a Preparatory School for West Point, he appeared before a board of officers at Oran in September of 1943. As a result he received orders which returned him to the States and detailed him to study at Amherst College. Successfully completing the U.S.M.A. Preparatory Course at Amherst, he entered West Point in July

of 1944.

In addition to being the ranking man in Law in his class, Reese ranked as a Distinguished Cadet in all subjects during his second year, was a member of the Cadet Choir, President of the Cadet Art Club, and a member of the Art Staff of the Cadet publications, *The Pointer* and *The Howitzer*, Technical Director of the 100th Night Show given by the cadet players, and Business Manager of the Dialectic Society.

The Association's award (this year a War Bond) was presented to Cadet Reese at an impressive review of the Corps of Cadets at sunset on Sunday, June 1. The cadets who were to receive academic awards came front and center from their companies. Upon receiving the prizes, they took position on the left of the Superintendent of the Academy. The Corps passed in review in their honor. General Mark Clark also received the review of the Corps, with the honored cadets. About 8000 alumni of the Academy and relatives and friends of the cadets witnessed the ceremony.

Cadet Captain Reese of the 2nd Cadet Regiment has entered the Army as a Second Lieutenant of Cavalry.

Lawyers in the News



William L.
RANSOM

■ Judge William L. RANSOM, the Association's fifty-ninth president, chairman of its Committee for Peace and Law Through United Nations, and Editor-in-Chief of the *JOURNAL*, was awarded the honorary degree of Doctor of Laws by Wesleyan University at its Commencement exercises held at Middletown, Connecticut, on June 15, 1947.

Arthur T. Vanderbilt, chairman of the Wesleyan Board of Trustees, who had intended to present Judge Ransom for the degree, was unable to be present because of illness.

President Victor L. Butterfield of the University read the following citation:

William Lynn Ransom, supremely successful lawyer, you have also served both your profession and your country with great distinction. Your leadership as President of the American Bar Association established for it a Constitution which made the organization representative of the whole legal profession. Even at the sacrifice of your health you have pushed the cause of

international justice both officially and as a private citizen. You are profoundly committed to the inalienable rights of free men and to government by law as the preserver of those rights and the guarantor of that freedom. Wesleyan is graced in honoring you and it is with both pleasure and appreciation that I now confer upon you the honorary degree of Doctor of Laws.

The Honorable Dean G. Acheson, then Assistant Secretary of State, and a member of the Association since 1932, was also awarded the LL.D. degree at the same exercises.

R. H. S.



John Coskie
COLLET

■ As was predicted in this department during Judge COLLET's two periods of administrative service in Washington in 1945-6 (see 32 A.B.A.J. 279, 682; May and October, 1946), President Truman has taken the first opportunity to elevate him to a higher place in the federal judiciary. Having been a United States District Judge in Missouri since 1937, he has been appointed to the United States Circuit Court of Appeals for the Eighth Circuit, to fill the vacancy due to the retirement of Senior Circuit Judge Kimbrough Stone.

The two Republican Senators from Missouri, Forrest C. Donnell and James P. Kem, and the lawyers of their party in their State, have shown freedom from partisanship in attesting Judge COLLET's qualifications and fitness for the higher post. His appointment and confirmation have also been supported by our As-

sociations' Committee on the Judiciary, on the basis of his experience and record in judicial office.

Details of his professional and judicial career have been given in previous issues of the *JOURNAL*. Since his admission to the Bar of Missouri in 1920, he has been city attorney in Jefferson City, prosecuting attorney for Charlton County, and Chairman of the Missouri Public Service Commission. He was appointed to the Supreme Court of the State in 1935 and elected for a ten-year term in 1936. His appointment to the federal bench followed in 1937. Judge COLLET has been a member of our Association since 1931 and has taken an active interest in the work of the Missouri State and local Bar Associations.



Norman
ARMOUR

■ The attractive opportunities which the State Department and the diplomatic service offer to Americans trained in the law are instanced anew by the recalling of Norman ARMOUR from his retirement to his farm near Princeton, New Jersey, to be Assistant Secretary of State with unprecedented scope of duties, at this critical juncture in world affairs.

He was born of American parents in Brighton, England, in 1887, and educated at St. Paul's School in New Hampshire, Princeton University, and the Harvard Law School (1913). Admitted to the New Jersey Bar in 1914, he soon turned aside from law practice for career diplomacy. He served in the American Embassies in France, Russia, Belgium, The Netherlands, Uruguay, Italy, and

Japan (Counsellor of the Embassy). Then he was Minister to Haiti and Canada, Ambassador to Chile, Argentina, and Spain. In each of these capacities this lawyer has manifested a skill, fidelity and distinction, that have made him America's foremost career diplomat.

ARMOUR was retired in 1945, but in June this tough-minded, law-trained diplomat was brought back in the emergency into the service of his country, to make his great experience and knowledge gained in the capitals of the world available in the leadership of the reorganized State Department. If, as is jocularly said, the most exclusive club in Washington is the ATRBM ("asked to remain by Marshall") there is distinction also in being recalled from retirement to take a "key" post.

pared by him for their New York State Bar examinations. For many years MEDINA conducted personally the "cram courses" which students from most of the law schools attended if they wished to enhance their chances of success in the severe tests for admission to the New York Bar.



Albert L.
REEVES, JR.

practised law in Steelville, has been a highly esteemed United States District Judge for the Western District of Missouri, and has sat in many noted cases.

Marked ability and a colorful personality enabled young REEVES to make headway in his profession. He joined the Army in April of 1942. In July of that year, he was made a Captain and assigned to the Missouri Division of the Corps of Engineers. He obtained the leases and easements and did the work preliminary to condemning a large part of the land taken over by the War Department in the area. Promoted to the rank of Major, he was stationed at Omaha, Nebraska, put in the Contracts and Claims Branch. In the fall of 1944 he became a Lieutenant Colonel and Chief of the Contracts and Claims Branch of the Division Engineers, with offices at Omaha and Denver, and was in charge of contracts and claims work with the special emphasis on renegotiation in the States of the Central West.

In the spring of 1945 REEVES was sent on a mission to India, where he remained until the end of the war. His services there were on the Lido or Stillwell Road. For several months he was the executive officer of the Transport Command which operated the convoys. He spent much time along the Road and made several flights into China over what was known as "the Hump" (the Himalayas). When the war ended, he was put in command of a large number of American troops awaiting transportation to the United States. About December 1, he put them aboard a ship and they were in New York on January 3. He immediately deactivated his troops, returned to Kansas City and obtained his release from active duty in April. For his capable service he was given a citation by the War Department. This was delivered to him by Brigadier-General Lewis A. Pick, now of Omaha, under whom he had served in the Engineers Corps and in India. Soon after his discharge from the Army he was prevailed on to run for election to the 80th Congress.



Harold R.
MEDINA

■ The member of Congress from the district which has been most conspicuously in the public eye during June is Albert L. REEVES, JR., of Kansas City, Missouri, member of our Association since 1935, and 1947-48 Chairman of its Committee to support the recommendations of the War Department's Advisory Committee on Improving Military Justice. He was elected to Congress for the first time last fall as a Republican, from the district long represented by Enos Slaughter, who was denied renomination in a bitter primary fight which had repercussions and is still under investigation.

REEVES was born in Steelville, Crawford County, Missouri, in 1906. He attended the public schools in Kansas City, and was graduated from William Jewell College, at Liberty, Missouri, and then for two years headed the department of speech at Baylor College, Texas. He obtained his degree in law from the University of Missouri School of Law in 1931, was admitted to the Bar in that year, and began the practice of law in Kansas City. Since 1923, his father, Albert L. Reeves, a member of our Association since 1916, who formerly

■ Because he was the first nominee selected and brought forward by the organized Bar for a federal judgeship, in opposition to the agreed-on choice of political leaders in the conspicuous Southern District of New York, MEDINA's nomination by The President has received Nation-wide attention as augury of an era of better appointments and confirmations for judicial office.

A sketch of his active career at the Bar was in our June issue (pages 537-539), in connection with the story of our Association's activity as to his judgeship. To the details there given may be added the interesting fact that very many of the lawyers who will practise before him were pre-



James
Gunn
LUMPKIN

■ At the age of forty-one an Associate Justice of the Seventh Court of Civil Appeals in Texas, LUMPKIN is one of the youngest appellate judges in the State. He had served as a First Lieutenant with the 142nd Infantry, 36th Division, from November of 1940 until April of 1942, when he was honorably discharged. He then became District Attorney for the 47th District, which post he held when he was appointed to the bench this year by Governor Beauford Jester, a member of our Association since 1922.

LUMPKIN was born in Amarillo, Texas, in 1906. He attended the public schools there, the New Mexi-

co Military Institute and the University of Texas (A.B., M. A., LL. B.). He is a member of the Amarillo Bar Association and State Bar of Texas, and has been a member of our Association since 1943.



George
Baldwin
McKIBBIN

■ A Chicago lawyer prominent in civic affairs, a member of our Association since 1921, has been appointed Deputy Director of the Internal Affairs and Communications Division of the United States Military Government in Germany. He was selected for the post by Former Governor Dwight P. Griswold, of Nebraska, who was the Director of the Division until he was named to

head the United States Mission to Greece.

McKIBBIN was born in Keosauqua, Iowa, in 1888. He attended Iowa Wesleyan College, the State University of Iowa Law School, and George Washington University Law School, and obtained his J.D. degree from the University of Chicago Law School in 1913. Admitted to the Illinois Bar in that year, he has since practised law in Chicago, and is a senior partner in the firm of Essington, McKibbin, Beebe and Pratt.

He was Director of Finance for the State of Illinois from 1941 to 1945, and the unsuccessful Republican candidate for Mayor of Chicago in 1943. He was the Director of Planning in the Illinois Post-War Planning Commission in 1945, and has since been the President of the Board of Public Welfare Commissioners. From 1932 to 1935 he was the President of the Chicago YMCA, and is a member of that organization's National Council as well as a director of the Chicago Round Table of Christians and Jews. He will leave to take up his duties in Berlin on June 30.

"An Englishman's Home" vs. "Self-Realization"

■ A dispatch from London to the New York *Times* quotes Lewis Silkin, Minister of Town and Country Planning in the Labor Government, as declaring his opposition to the ancient and honored belief that "an Englishman's home is his castle." That conception of a home, the Minister said in a speech at Norwich, makes for selfishness and denial of "self-realization."

"It is this self-realization," the spokesman for the Labor Party Cabinet said, "that we want to achieve in order that the people may not merely lead a happy and selfish life but be able to give of their best to the service of the community." The dispatch to the *Times*, emphasizing the break with the Anglo-Saxon past,

says that the phrase to which the Minister of Marxian Socialism objects was coined by Sir Edward Coke, great British jurist of the Seventeenth century and the first judge to be called Lord Chief Justice of England.

The current effort of the Labor Party Marxians to uproot, in favor of a vague "self-realization" (whatever that may mean), the traditional Britisher's sense of independence and self-sufficiency long based on the security of his home against invasion by agents of Government, confirms the judgment formed and strongly held by many Americans; viz, that when the rights and prerogative of personal thrift, free individual enterprise, the privacy of the home, and private ownership of property, are

taken away by collectivism or governmental regimentation under whatever name the taking is masked, the ground has been broken and the foundations have been laid for the rapid whittling away and impairment also of the substance and reality of even the most basic of human rights.

Historic liberties for the individual do not survive the destruction of the rights of property, savings, venture enterprise, and security through personal work and skill. "That an Englishman's home is his castle" may still be the rallying cry someday for those valiant Britishers who cherish their historic freedoms. At least, American lawyers and other citizens are forewarned by what is taking place in England and other lands.

William E. Borah:

Statue of Idaho's Great Lawyer Is Unveiled

■ A striking statue of the late William E. Borah, Idaho's famed Senator, one of the most colorful and individualistic lawyers of the present century, was unveiled in the rotunda of the Nation's Capitol on June 6, in the presence of members of the Senate and others of official Washington as well as Mrs. Borah and several kinfolk of the militant defender of the Constitution as he read and interpreted it during his thirty-three years of service in the Senate. The statue had been executed in bronze by Bryant Baker, New York sculptor, on order of the Borah Statue Commission created by the Idaho Legislature in 1945.

■ "Idaho Day" in the rotunda and the Capitol. The Marine Band played the State song, "Here We Have Idaho". Governor C. A. Robins, of Idaho, accepted the statue for the State and former Senator Henry C. Dworshak for the National Government. In the unveiling the cords were pulled by Mrs. C. Wayland Brooks, wife of the Senator from Illinois, and daughter of former Senator John Thomas, of Idaho, who was one of Senator Borah's most intimate friends. Inside the silken ropes which separated the invited guests from about a thousand spectators were a nine-year old great nephew and namesake of Senator Borah, with the boy's father, United States Circuit Judge Wayne G. Borah, of New Orleans and the Fifth Circuit Court of Appeals, Senator Borah's nephew.

Senator Vandenberg Extols Borah's Services to His Country

The address of the occasion was delivered by Senator Arthur H. Vandenberg, of Michigan, President Pro Tem of the Senate, who declared that Senator Borah was "greater" than any of the seven Presidents, beginning with Theodore Roosevelt, who were in office during Borah's career in the Senate, which ended with his death in 1940. "Senator Borah was one of those few statesmen—I can think of but two or three others in our history—who was greater than any President under whom he served and for whom the Presidency could have added nothing to his stature or his laurels." The Michigan leader also referred to the Idaho lawyer as "my greatest friend in public life," and one to whom he owed an unpayable debt. When at the age of 44 in 1928, Vandenberg came to the Senate, Senator Borah was 19 years older and gave the new ar-

rival much good advice. Senator Vandenberg said he felt it to be a precious privilege to "welcome the return" of Senator Borah to the Capitol, "which within recent memory he dominated with his devoted statesmanship and his rugged personality and character." He belongs beneath this dome forever. His client was the Constitution of his country. His constituent was the common citizen of the republic. There was some-



Mrs. William E. Borah at the Unveiling of the Statue

thing in him of the strength of the mighty mountains of the West whence he came." Senator Vandenberg brought back to mind Mr. Borah's opposition to the entry of the United States into the League of Nations and World Court, and his fears of any trends which "would unnecessarily involve us in other people's destinies and other people's wars." "He never knew about Pearl Harbor," added Senator Vandenberg. "Since his passing, events have written new and startling history with a rushing pen. We have no right to speculate on how he would have met these epochal events. But of this we may be sure—he would have met them with forthright courage and strength and fidelity and with the infinite patriotism which was the habit of his life."

Senator Borah's "ever-present passions," Mr. Vandenberg stated, were: (1) He fought hard against needlessly

involving his country in war; (2) He was the "implacable defender" of the Constitution; and (3) He "hated monopoly and special privilege." The Michigan Senator also said that Mr. Borah as Chief Justice of the United States would have been a worthy successor to John Marshall.

Statue To Be Placed In the Senate Corridors

It is said that the bronze will remain in the Capitol rotunda only temporarily. Later it will be removed, probably to one of the Senate corridors. There are only a few statues in the rotunda, which has been reserved for tributes to only a few of the Nation's great—Washington, Lincoln and the like. Each State is entitled to two statues in Statuary Hall. The hall is over-crowded, and States with one already there usually place their second monument in some other appropriate location in

the Capitol. Idaho already has in Statuary Hall a statue of George L. Shoup, first Governor of the State and its first Senator. The ten-foot statue seems to be of a younger Borah than the veteran who opposed the League of Nations and the World Court, but it brings memories of the eloquent voice and the incisive logic of the lawyer-statesman who steered always an independent course which brought him continually into conflict with the policies of Presidents, the views of his own and the opposing political party, and the considered judgment of the leaders of his profession. Born in Illinois, practicing law awhile at Lyons, Kansas, moving thence to Idaho in 1887, he will long be remembered as having been outstanding among American lawyers in public life, although lacking the capacity for conformance and team work which might have made him President or Chief Justice.

Association Cooperates as to The Freedom Train

■ Under authority voted by the Board of Governors, the Association is taking part in the planning of the American Heritage Program and the inauguration of The Freedom Train. The latter will house as a National Shrine about 100 original documents of American history, including the Declaration of Independence, a draft of the Constitution with George Washington's annotations, the Bill of Rights, the Emancipation Proclamation, etc. About 200 communities will be visited and the documents exhibited to the people in all of the States. The train will leave Philadelphia on September 17, the 160th anniversary of the signing of the Constitution. The tour will last about one year.

In each locality visited there will be a Community Rededication Week, for instilling the faith and the practices of popular government and

our federal republic. The week will be broken down into special days, such as Veterans' Day, School Day, Bench and Bar Day, etc. The organized Bar is being mobilized to furnish many of the speakers for the patriotic events.

A distinguished Board of Trustees of the American Heritage Foundation, headed by Winthrop W. Aldrich, of New York, has the project in charge. It has been stated that the funds for the program and the train will be obtained from private sources. Assurances have been given that the enterprise will be conducted on a wholly non-partisan basis. There are controversial questions as to some of the documents to be included and as to a possible partisan "slant" or use of the project. It is expected that these can be ironed out. The announcement of the Board of Trustees says:

Since the cessation of hostilities, voices of discord have been all too prevalent on the American scene. Lawlessness and cynicism, the twin spectres following in the wake of war, are very much with us. Subversive forces in various guises seek to undermine the democratic structure. Demagogues and bigots carry on their disruptive game of setting one group of Americans against another.

In this crucial period, we deem it highly desirable that a comprehensive program of education in the ideals and practices of American democracy be launched. Americans tend to take their democratic government for granted.

A working democracy requires the personal participation by its citizens in affairs of government. There is need to develop greater participation by our citizenry. Above all, there is the constant necessity to inculcate in the youth of America a full appreciation of the heritage of which they will be the trustees of tomorrow.

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

ADMINISTRATIVE LAW

Federal Communications Commission's Discretion to Refuse Renewal of License because of Misrepresentation

Federal Communications Commission v. WOKO, 90 L. ed. Adv. Ops. 190; 67 Sup. Ct. Rep. 213; U. S. Law Week 4048 (No. 65, decided December 9, 1946).

The Commission in this case refused to renew WOKO's license to operate a radio station. While it appears that the station has rendered public service of acceptable quality and is able to continue to do so, the Commission refused the renewal because of misrepresentations as to the ownership of the stock of the applicant and its predecessor. This misrepresentation had extended over a period of twelve years. The purpose of the misrepresentation was to conceal the holdings of one stockholder and his family from certain of his colleagues in the Columbia Broadcasting System.

The Circuit Court of Appeals for the District of Columbia reversed the Commission's order; but on certiorari the Supreme Court sustained the Commission. Mr. Justice JACKSON delivered the Court's opin-

ion. He cites the statutory authority whereby the Commission is empowered to require of applicants a wide range of information including facts as to citizenship, character, financial, technical, and other qualifications, and as to "the ownership and location of the proposed station." Attention is also called to the statutory provision that court review of administrative action is limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless clearly arbitrary or capricious.

Various arguments were advanced in support of the Circuit Court's reversal of the order. These embrace contentions that the deception was irrelevant to the decision, that the order imposes undue hardship on the innocent stockholders, that it was a sudden departure from the Commission's prior practice, that it inflicts a penalty, and that it was made without required findings as to past service and ability to render good service in the future. All of these contentions are rejected by the Court. The opinion concludes with this observation: "We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law."

Mr. Justice BLACK did not participate.

The case was argued by Mr. Harry M. Plotkin for the FCC and by Mr. William J. Dempsey for WOKO.

Farm Credit Administration—Claims of United States—Priority of Administrative Agency to Payment under §3466 of Revised Statutes

United States v. Remund, 91 L. ed. Adv. Ops. 780; 67 Sup. Ct. Rep. 891; U. S. Law Week 4355. (No. 417, decided March 17, 1947.)

In this case the Supreme Court in an opinion by Mr. Justice MURPHY discusses the question whether a claim asserted by the Farm Credit Administration on behalf of the United States is entitled to priority of payment under Section 3466 of the Revised Statutes, 31 U.S.C. § 191. The loans on which the claim was based were made by the Farm Credit Administration pursuant to the Acts of February 23 and June 19, 1934. They were made as emergency feed and crop loans and total \$370. The borrower died leaving most of the loans unpaid, and an agent of the Farm Credit Administration filed a claim against the estate for \$523.80, being the amount of the loans and unpaid interest. The state courts denied priority to the claim and allowed only a pro rata share as a common creditor's claim.

On certiorari the Supreme Court

* Assisted by James L. Homire and Mark H. Johnson.

reversed with Mr. Justice DOUGLAS dissenting. The opinion rejects the argument that the claim does not fall within Section 3466 because it is not a debt due the United States.

Mr. Justice DOUGLAS dissented on authority of the *United States v. Guaranty Trust Company*. H.

The case was argued by Mr. Paul A. Sweeney for the United States, and submitted by Mr. Dwight Campbell for Remund.

United States Warehouse Act — State Statutes — Illinois Public Utilities Act — Supremacy of Federal Statutes

Rice v. Santa Fe Elevator Corp.; Ill. Comm. Com. v. Same; 91 L. ed. Adv. Ops. 1043; 67 Sup. Ct. Rep. 1146; U. S. Law Week 4480. (No. 470 and 472, decided May 5, 1947).

Santa Fe Elevator Corporation, operates warehouses for the storage of grain in Illinois. Their warehouses were operated under license of the Secretary of Agriculture pursuant to the United States Warehouse Act. The Rices, a partnership, are owners, shippers and dealers in grain and customers of the elevator. The Illinois Commerce Commission has certain regulatory supervision over public warehouses and other public utilities in Illinois.

In 1944, the Rices filed a complaint with the Commission charging the elevator with maintaining unjust, unreasonable, and excessive rates and charges contrary to the Illinois Public Utilities Act and with discriminating in favor of the federal government contrary to the above Act and the Illinois Grain Warehouse Act. The complaint also charged that the elevator was both a warehouseman and a dealer in grain and by reason of seeking profits in those conflicting relationships conducted their business in defiance of those statutes and the Illinois Constitution of 1870. The complaint also charged that the elevator failed to provide reasonable services and in various other ways disregarded the provisions of Illinois statutes.

The elevator moved the Commission for an order dismissing the complaint. That motion was denied, whereupon the elevator brought suit in the United States District Court to enjoin further proceedings before the Commission and to enjoin the Attorney General of Illinois from enforcing any order of the Commission in the matter. Motions of the Rices to dismiss were granted but on appeal, the Circuit Court of Appeals, Seventh Circuit, reversed. The Supreme Court took the case on certiorari and affirmed in part and reversed in part the decision of the Circuit Court.

Mr. Justice DOUGLAS delivered the opinion of the Court. He reviews provisions of the United States Warehouse Act and the Illinois Warehouse Acts and notes that the early federal legislation expressly left the Illinois law in full force. He shows that fifteen years after the passage of the original federal Warehouse Act, that Act was amended so as to provide that the power, authority and jurisdiction of the Secretary of Agriculture, conferred by the Act, should be "exclusive with respect to all persons securing a license hereunder so long as said license remains in effect."

Mr. Justice DOUGLAS takes up the various specific charges of disregard of Illinois law and declares that the Federal Act has provisions which could cover all the offenses charged. He then takes up the question of the consequences of the 1931 Amendment of the Federal Act and the interpretation of the purpose and intent of the amendment. He notes that since warehouses handling grain for interstate commerce are in the federal domain, Congress may take unto itself all regulatory authority over them or may share the task with the states or may adopt the state scheme of regulation as its own. "The question in each case is what the purpose of Congress was."

Mr. Justice DOUGLAS examines the facts bearing on the purpose of Congress and states the contentions of the parties as to the proper interpretation of the Federal legislation and

comes to the conclusion that in view of the "special and peculiar history of the Warehouse Act" the construction, urged by the Commission, of joint and concurrent control would "thwart the federal policy which Congress adopted when it amended the Act in 1931." The conflicting considerations are reviewed and he says that the use of the words "power, jurisdiction and authority" of the Secretary conferred under the Act "shall be exclusive with respect to all persons" licensed under the Act, clearly discloses the purpose and intent of Congress to "make the Federal Act independent of State Laws." He also points out that the report of the House Committee said that the purpose of the amendment was to make the Act "independent of any State legislation on the subject." Of that Committee Report Mr. Justice DOUGLAS says: "That is strong language. It makes unambiguous what was meant by the deletion from § 6 of any requirement that federal licensees comply with state laws regulating warehousemen." And he says, "The amendments to § 6 and § 29, read in light of the Committee Reports, say to us in plain terms that a licensee under the federal Act can do business 'without regard to State acts'; that the matters regulated by the Federal Act cannot be regulated by the States; that on those matters a federal licensee (so far as his interstate or foreign commerce activities are concerned) is subject to regulation by one agency and to one agency alone."

He then points out that nine of the twelve charges in the Rices' complaint were matters with which the Federal Act dealt, and that the elevator having a federal license was not amenable to state laws with respect thereto. And he declares that, "The provisions of Illinois law on those subjects must therefore give way by virtue of the Supremacy Clause."

As to the three charges of breach of the Illinois law not expressly covered by the Federal Act, Mr. Justice DOUGLAS says that it would be time to consider the action of the Illinois Commission on those charges when

actual conflict with the Federal Act occurred.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which Mr. Justice RUTLEDGE concurred.

It is pointed out that more than seventy years ago in *Munn v. Illinois* the Court had upheld the regulations of grain warehousing rates by Illinois despite the relation of the great grain elevators to interstate commerce. It is declared that state regulation of grain elevators had become "so much a part of our economic fabric and so important that when Congress in 1916 passed the first Warehouse Act, it made that act subordinate to the requirement of State laws". From that foundation is launched the attack on the holding that the 1931 Amendment by Congress not only made the federal regulation independent of State law but also nullified the long recognized State power to regulate warehouses, "even though such laws and power, in their actual operation, in nowise conflict with the operation of the federal law."

Mr. Justice FRANKFURTER says that this conclusion is rested by the Court upon the language of Congress which gave to the Secretary of Agriculture "exclusive" power "with respect to all persons securing a license hereunder . . ." As to the interpretation of those words, he says that they are susceptible without violence to an interpretation which "would leave State law to operate where it could without impinging on the limited regulatory functions assumed by the Federal Government." It is pointed out that there is no grant of authority to the Secretary of Agriculture to make and establish rates or to regulate them, that the authority of the Secretary is limited to the cancellation of the license on proof of excessive rates. Instances are given of important matters in which the States could have harmoniously cooperated with the Federal authorities toward the best service for the public by the elevators. In the closing sentences of the opinion it is said, "The Court displaces settled and fruitful State authority though it cannot replace it with federal authority." T.

The case was argued by Mr. William C. Wines for Illinois Commerce Commission in No. 472; by Mr. Lee A. Freeman for Rice in No. 470; and by Mr. Leo F. Tierney for Santa Fe Elevator Corporation.

Rice v. Board of Trade; Illinois Commerce Comm. v. Same, 91 L. ed. Adv. Ops. 1058; 67 Sup. Ct. Rep. 1160; U. S. Law Week 4488. (Nos. 471 and 473, decided May 5, 1947.)

These two cases are companion cases of *Rice v. Santa Fe Elevator Corp.*, reviewed above. When the Rices brought their complaint against the elevator in the case reviewed above, complaint was also filed with the Commission against the Chicago Board of Trade. It was therein charged that rules of the Board of Trade were unfair, unreasonable and discriminatory. The Board moved to dismiss on the ground that the federal Commodity Exchange Act superseded the power and jurisdiction of the Illinois Commission. That motion was denied. Whereupon the Board of Trade brought these suits before the United States District Court to enjoin the proceedings before the Commission. The District Court dismissed the complaint and the Circuit Court of Appeals, Seventh Circuit, reversed. On certiorari the Supreme Court reversed. Mr. Justice DOUGLAS delivered the opinion of the Court.

The opinion points out that the Commodity Exchange Act, here involved, did not grant to the Secretary of Agriculture in regard to contract trading markets the same "exclusive" power given to the Secretary by the United States Warehouse Act in the other cases. Reference is made to many provisions of the Commodity Exchange Act from which is deduced the intent of Congress to leave to State law a broad field of power and discretion. It was also held that the action here was premature since nothing was done by the Commission in regard to the Chicago Board of Trade which would have interfered with any of the powers granted to the Secretary of Agriculture. It was declared therefore that if and when

the Commission took action against the Board of Trade which conflicted with the Secretary's rules and regulations, charges of that character might then be taken up and considered. T.

The case was argued by Mr. Lee A. Freeman for Rice in No. 471; by Mr. William C. Wines for Illinois Commerce Commission in No. 473, and by Mr. Howard Ellis for Board of Trade.

CRIMINAL LAW

Farm Labor Supply Act of 1944—Prosecution Under That Act—Immigration Act as Amended in 1917

U. S. v. Hoy, 91 L. ed. Adv. Ops. 917; 67 Sup. Ct. Rep. 1004; U. S. Law Week 4431 (No. 585, decided April 7, 1947).

A United States Attorney filed an information charging the accused with violation of Section 5 of the 1917 Immigration Act, in attempting to induce Mexican laborers unlawfully to enter the United States.

The District Court held that the 1944 Farm Labor Act made the 1917 Act inapplicable to such farm laborers, and therefore inapplicable to those who induced their entry and dismissed the information. On direct appeal the Supreme Court reversed the judgment of the District Court.

Mr. Justice BLACK delivered the opinion of the Court. The opinion states that the purpose of the 1944 Act was to aid the war effort by permitting agricultural laborers from the Western hemisphere to enter the United States, and that the question presented was whether that Act repealed the 1917 Act which forbade such entry, and repealed the provisions of the 1917 Act which made it a crime to assist such immigration.

The 1917 Act is examined, its broad scope and purpose is pointed out and it is shown that it was a manifestation of a fixed national policy to regulate the entry of alien agricultural labor. The extent of the activities of the Bureau of Immigration was referred to as tangible evidence

of the extent to which that policy had been uniformly enforced.

Mr. Justice BLACK next proceeds to compare the scope of the 1944 Farm Labor Act with the 1917 Immigration Act. He points out that many of the provisions of the earlier act are in no way dealt with by the later act. In examining the legislative history of the 1944 Act he shows that in the report to Congress the temporary purpose of the bill is emphasized and shows that it was declared in those reports that the new act was "not in any way interfering with the firmly established national immigration policy."

The conclusion is therefore reached that the later Act did not repeal the 1917 Act, but carefully preserved all of its provisions except those which would prevent temporary admission to the United States of alien agricultural laborers.

The opinion next takes up the question whether the second Act repealed the provisions of the former Act forbidding employers to induce alien laborers, not authorized to enter under the earlier Act, to be brought into the United States. Attention is called to the provision of the 1944 Act that Section 5 of the 1917 Act was not to apply to anyone importing "aliens under this title." But, it is said, that the accused was not charged with attempting to bring laborers into this country "under this title,"; he was "allegedly inviting them to enter the country in disregard and defiance of 'this title' and all other law."

The conclusion is therefore reached that the information charged an offense and should not have been dismissed. T.

The case was argued by Mr. Peyton Ford for the Government and submitted by Mr. Henry O. Bodkin for Hoy.

FEDERAL PROCEDURE

Enforcement of Subpoena Duces Tecum

The Penfield Company v. Securities and Exchange Commission, 91 L. ed.

Adv. Ops. 833; 67 Sup. Ct. Rep. 918; U. S. Law Week 4385. (No. 453, decided March 31, 1947.)

The Securities and Exchange Commission issued a *subpoena duces tecum* to Young to produce certain books of the Penfield Company of which Young was an officer. He refused to produce them and the SEC asked the District Court to compel Young to obey the subpoena. That Court ordered Young to produce the books but he persisted in his refusal to comply. On an order to show cause why contempt proceedings should not be had against Young, he was fined \$50 by the District Court. He paid the fine. But the Court refused to grant any relief to compel Young to produce the books. The Circuit Court of Appeals reversed the ruling of the District Court holding that it was error to impose the fine and directing that Young be imprisoned until he produced the documents.

On certiorari the judgment of the Circuit Court was affirmed by the Supreme Court. Mr. Justice DOUGLAS delivered the opinion of the Court. He states that the case presents two questions on the merits: (1) Whether the Circuit Court erred in granting remedial relief to the SEC; and (2) whether the Court exceeded its authority in reversing judgment imposing the fine and substituting therefor a term of imprisonment conditioned on continuance of the contempt.

The conclusion is reached that it was an abuse of discretion on the part of the District Court to refuse coercive relief to compel production of the books in question. The Court notes that although in a criminal contempt proceeding both fine and imprisonment may not be imposed, since the statute provides alternative penalties, and assuming *arguendo* that the statute allowing fine or imprisonment governs civil contempts also, nevertheless if the statute is so construed it is no barrier to the imposition of both a fine as a punitive exaction and imprisonment as a coercive sanction. "When the court imposes a fine as a penalty, it is punish-

ing yesterday's contemptuous conduct. When it adds the coercive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct. At least in that situation the offenses are not the same. And the most that the statute forbids is the imposition of both fine and imprisonment for the same offense."

There was a difference of opinion among the Justices as to whether that part of the order of the Circuit Court which set aside the fine was before the Supreme Court for review. Assuming that it was, a majority of the Court was of the opinion that the Circuit Court properly set it aside since the fine was for a civil contempt.

Mr. Justice RUTLEDGE delivered a concurring opinion. As to the disposition of the case he felt that the formulation of remedial relief should be made by the District Court rather than by an appellate court.

Mr. Justice FRANKFURTER delivered a dissenting opinion in which Mr. Justice JACKSON concurred. The basis of this dissent is that the granting of relief rested within the discretion of the District Court and that there was no abuse of discretion in denying remedial relief in view of the fact that that Court had conducted a six-weeks' trial involving the affairs of Penfield, and as a result of that trial it had concluded that there was no longer any need for calling on Young to produce books. H.

The case was argued by Mr. Morris Lavine for the Penfield Company, and by Mr. Roger S. Foster for Securities and Exchange Commission.

Judgment Notwithstanding Verdict, Rule 50(b)

Cone v. W. Va. Pulp & Paper Co., 91 L. Ed. Adv. Ops. 683; 67 U. S. Sup. Ct. Rep. 752; U. S. Law Week 4278. (No. 184, decided March 3, 1947)

This was an action brought in a South Carolina State Court by one who claimed to be the owner and in possession of timber land, to re-

cover damages for trespassing and cutting timber on his land.

On the ground of diversity of citizenship the action was removed to the Federal District Court. On trial there both ownership and possession were critical issues.

At the close of all the testimony motion for directed verdict was made by the West Virginia Company for failure to prove either ownership or possession of the land. That motion was denied and the jury rendered a verdict for the plaintiff. The court entered judgment on the verdict. Motion for new trial was entered and denied. The defendant did not move for judgment notwithstanding the verdict, as it might have done under Rule 50(b).

The Circuit Court of Appeals, Fourth Circuit, held that certain evidence of title was improperly admitted and that without that testimony the plaintiff's evidence was insufficient to warrant the submission of the case to the jury. It therefore reversed but instead of remanding the case to the district court for a new trial the Circuit Court of Appeals directed that judgment be entered for the West Virginia Company. The Supreme Court reversed.

Mr. Justice BLACK delivered the opinion of the Court. He points out that by the entry of that judgment, the Circuit Court construed Rule 50(b) as "authorizing an appellate court to direct a judgment notwithstanding the verdict, even though no motion for such judgment had been made in the District Court, within ten days after the jury's discharge", that being the time limit specified by the rule.

In sustaining the challenge contained in the plaintiff's petition for certiorari the opinion points out in the first place that "Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party." It is declared that the rule permits the trial court "to exercise discretion to choose between the two alternatives

... and he can exercise this discretion with a fresh personal knowledge of the issues involved ... and the impression made by the witnesses."

It is also pointed out that the choice of those alternatives, new trial or judgment notwithstanding verdict, calls for exercise of the discretion committed to the judge who hears and sees the witnesses and who therefore is possessed of qualifications which no appellate record could impart.

T.

The case was argued by Mr. H. Wayne Unger and Mr. James P. Mozingo, *pro hac vice*, by special leave of Court for Cone; and by Messrs. Christie Benet and Charles W. Waring for West Virginia Pulp & Paper Co.

TAXATION

Refunded Tax as Income—Recoupment

Rothensies v. Electric Storage Battery Co., 91 L. ed. Adv. Ops. 226; 67 Sup. Ct. Rep. 271; U. S. Law Week 4075 (No. 48, decided December 16, 1946).

The taxpayer had paid certain excise taxes during the years 1919-1926, and in 1926 claimed a refund. In 1935, after litigation, it obtained a refund of the taxes paid for 1922-1926, but the 1919-1921 taxes were barred by limitations. It had deducted all of these taxes in the respective prior year returns, and had obtained a tax benefit from the deductions. The government contended that the refund was income in 1935. The taxpayer denied that there was income, and alternatively contended that the additional 1935 income tax resulting from that income should be offset by the barred overpayments of 1919-1921 excise taxes.

In an opinion by Mr. Justice JACKSON, the government was sustained on both issues. Without discussion, it was held that the refunded tax was taxable income in the year of refund. On the recoupment issue, the opinion states that the statute of limitations should not be "undermined" except under very special circum-

stances. The permissible limits of the recoupment doctrine do not extend beyond a case where the barred overpayment arose at the same time and out of the same transaction as the additional tax in issue. Here, the relationship between the taxes was held not sufficiently close to warrant that result.

Mr. Justice MURPHY, Mr. Justice BLACK, and Mr. Justice RUTLEDGE dissented.

J.

The case was argued by Mr. Arnold Raum for the taxing authorities; by Mr. Laurence H. Eldredge for Electric Company.

Constitutionality of State Franchise Tax Measured by Goods Manufactured and by Goods Sold in State

International Harvester Co. v. Evatt, 91 L. ed. Adv. Ops. 301; 67 Sup. Ct. Rep. 444; U. S. Law Week 4131 (No. 75, January 6, 1947.)

The taxpayer contended that the Ohio corporation franchise tax violated the Due Process Clause and the Commerce Clause. The statute requires each foreign corporation authorized to do business in Ohio to pay a privilege tax upon such parts of its capital stock as represents business and property conducted and located in the state. The statutory formula requires that one-half of the total value of capital stock be multiplied by a fraction, the numerator of which is the value of all the taxpayer's Ohio property, and the denominator of which is the total value of all its property wherever owned. The other half is multiplied by another fraction whose numerator is the total value of the "business done" in the State and whose denominator is country-wide business. Addition of these two products gives the tax base, which, when multiplied by the tax rate of 1/10 of 1%, produces the amount of the franchise tax.

The taxpayer owned and operated factories, branch selling establishments associated with warehouses, and retail stores in Ohio; and also owned and operated other factories, selling agencies, and retail stores in

other States. Its practice was to conduct and account for its sales agencies' activities separately and distinctly from its factory operations. The State followed this distinction. It treated the sales agencies as conducting one type of business and the factories another. In the "business done" numerator for factory operations, the State included as a part of Ohio business an amount equal to the sales proceeds of a large part of the goods manufactured at the taxpayer's Ohio plants, no matter where the goods had been sold or delivered. A part of the measure of the tax was consequently an amount equal to the sales price of Ohio-manufactured goods sold and delivered to customers in other states. Similarly, the State measured the value of the Ohio sales agencies' business by the total amount of Ohio sales of goods manufactured outside of Ohio as well as those manufactured in Ohio.

On appeal from a decision sustaining the tax, the Court affirmed in an opinion by Mr. Justice BLACK.

The opinion points out that Ohio did not tax out-of-state sales; it merely measured its privilege tax by the value of goods produced in Ohio factories, wherever sold. Similarly, in computing Ohio business by the sales agencies, it properly included goods sold in Ohio, even though manufactured outside the State; the selling transaction was intrastate. (On the latter point, the opinion expressly refuses to decide whether the tax would be valid if the sales were interstate.) The Court considers that these facts answer the arguments both with respect to the Commerce Clause, and with respect to the Due Process Clause. As to the former, the opinion notes that a State is not barred from imposing "a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business". The purpose of the formula devised by Ohio is "to arrive without due complication at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted". Since the apportion-

ment here did not produce a "palpably disproportionate result", and since there was no danger of a similar tax by another State upon the same privilege, the tax is valid.

Mr. Justice RUTLEDGE concurred in the result. J.

The case was argued by Messrs. Joseph J. Daniels and Edward R. Lewis for International Harvester Company; and by Mr. Aubrey A. Wendt for Tax Commissioner.

Interstate and Foreign Commerce—Constitutionality of Tax upon Gross Receipts of Stevedoring Company

Joseph v. Carter & Weekes Co., 91 L. ed. Adv. Ops. 720; 67 Sup. Ct. Rep. 815; U. S. Law Week 4339 (Nos. 29, 30, decided March 10, 1947).

New York City imposed its general gross receipts tax upon the receipts of a taxpayer whose business was loading and unloading vessels engaged in interstate and foreign commerce. The tax was held unconstitutional by the New York courts, on the authority of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90. The Supreme Court granted certiorari on the issue of whether the tax was an unconstitutional burden on commerce. The City apparently conceded that the *Puget Sound* case was squarely in point, but contended that the reasoning of that case was no longer controlling.

The tax was held unconstitutional in an opinion by Mr. Justice REED. Reaffirming the *Puget Sound* doctrine, the opinion states that loading and unloading of ships engaged in interstate and foreign commerce is a "continuation of the transportation" and is "an essential part of the safety and convenience of the transportation itself". Mr. Justice REED distinguishes those cases in which the Court found a "definite separation between the taxable event and the commerce itself". He distinguishes also the cases which have sustained a tax measured by gross receipts, where such tax was in lieu of *ad valorem* taxes on property. The mere absence of actual or potential multiple taxation is not enough to validate a tax which actually burdens

interstate or foreign commerce. Nor is it sufficient to show that the tax is not intended to discriminate against such commerce.

The opinion concludes with the following pragmatic justification: "What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause."

Mr. Justice DOUGLAS, in an opinion in which Mr. Justice RUTLEDGE concurred, agreed that the tax was invalid upon receipts from loading and unloading vessels engaged in foreign commerce, because such a tax was in direct violation of the Import and Export Clause. He disagreed, however, with respect to the tax upon interstate commerce, on the ground that the implied limitations of the Commerce Clause do not prohibit a tax upon intrastate activities which is nondiscriminatory and which is not susceptible of duplication.

Mr. Justice MURPHY agreed with Mr. Justice DOUGLAS' dissent on interstate commerce, but disagreed on foreign commerce.

Mr. Justice BLACK dissented without opinion. J.

The case was argued by Mr. Isaac C. Donner for Joseph and by Mr. Samuel M. Lane for Carter & Weekes Co.

Courts, Departments and Agencies

E. J. Dimock . . EDITOR-IN-CHARGE

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Constitutional Law. . . where statutory review of commission's rate fixing orders is limited to question of law, remedy is inadequate and aggrieved party alleging confiscation may proceed by independent suit in equity.

■ *Staten Island Edison Corp. v. Maltbie et al., Individually and Constituting the New York Public Service Commission*, N. Y. Ct. App., May 22, 1947, Thacher, J.

Plaintiff, a New York corporation doing an intrastate business in the production and sale of electric power, brought suit in equity in the Supreme Court to enjoin the enforcement of orders of the Public Service Commission setting the rates to be charged by plaintiff. Plaintiff claimed that the rates were so low as to be confiscatory of its property in violation of the Fourteenth Amendment of the U. S. Constitution and Article I of the New York Constitution. The Commission moved to dismiss the complaint on the ground that plaintiff's only recourse to the courts was by a petition for certiorari under Article 78 of the New York Civil Practice Act. Plaintiff contended, however, that certiorari was not a constitutionally adequate remedy for, in certiorari proceedings, the court could not review the Commission's determinations upon questions of fact but only its determinations upon questions of law and it was constitutionally entitled to an independent judicial determination as to both the law and the facts, citing *Ohio Valley Co. v. Ben Avon Borough* (253 U. S. 287). The Supreme Court granted the motion to dismiss, but the Appellate Division reversed and granted a temporary injunction. Upon appeal, the Court held that plaintiff's allegations, which had to be taken at face

value, clearly supported the claim of confiscation. As to the question of the right to resort to the courts, the Court said that the principle of the *Ben Avon* case, *supra*, that where constitutional rights of liberty or property were involved, due process required independent judicial determination of the constitutional question in the courts, had been subsequently affirmed in several cases. It stated: "There would indeed be a very drastic limitation upon the constitutional powers of the Supreme Court of the State if it may not enjoin an unconstitutional deprivation of property because of an administrative determination of constitutional right supported by administrative findings of fact believed to be wrong upon a fair consideration of the record. The remedy by certiorari proceedings being thus limited is inadequate in the protection of constitutional right and, in view of the decisions of the Supreme Court of the United States, is lacking in due process." As to the arguments advanced on grounds of convenience, the Court said there was no compelling necessity for a trial *de novo* of every rate case in which confiscation was claimed and that it need not now consider under what circumstances, if any, the court might be justified in receiving additional proofs or newly discovered evidence. Desmond, J., dissenting, was of the opinion that the *Ben Avon* case, *supra*, had been, "to put it mildly", weakened by more recent decisions of the Supreme Court, citing *Railroad Comm. v. Oil Co.* (310 U. S. 573, 311 U. S. 570), *Power Comm. v. Pipeline Co.* (315 U. S. 575), and *Power Comm. v. Hope Gas Co.* (320 U. S. 591). He pointed out that, although the state must make avail-

able adequate judicial procedures to determine whether or not a particular rate resulted in an illegal forfeiture of private property, the citizen had no vested right to any one form of procedure and that access to the courts for protection was sufficient. He said: "The practice in this State for well over a hundred years has been for the courts to perform their proper judicial functions in relation to quasi-judicial bodies by testing the actions of those bodies for reasonableness and legality, without ousting them from their own special fields of investigation. Due process demands no more." With reference to the practical effect of the decision, Judge Desmond said: "We make no prediction as to the size and force of the impact of this present decision on the whole carefully built and strengthened system of protecting the interests of the people of this State. The decision, it cannot be denied, upsets a workable and working system. It authorizes an additional cumbersome and elaborate method of court review when there is neither practical nor theoretical need therefor. And, based as it is on a construction of the Federal Constitution, our ruling will be beyond the power of the State Legislature to correct."

Constitutional Law. . . full faith and credit . . divorce . . husband is not relieved of liability for alimony under prior state judgment of separation by subsequent valid absolute divorce in foreign court which lacked personal jurisdiction over wife.

■ *Estin v. Estin*, N. Y. Ct. App., April 18, 1947, Loughran, C. J.

A former wife moved for judgment against her former husband for arrears of alimony which had been

granted her by a New York judgment of separation entered in October, 1943. The husband filed a cross motion for an order striking the alimony provisions from the separation decree as of May, 1945, when he had been granted an absolute divorce by a court of Nevada under a judgment which made no provision for alimony. It was found that the husband was, and had been since January, 1944, a bona fide resident of Nevada. It was also found that the Nevada court had lacked personal jurisdiction over the wife when it granted the absolute divorce. The Court of Appeals held that, although the full faith and credit clause required recognition of the Nevada decree as far as dissolving the marriage was concerned, the decree had not cancelled the alimony provision of the prior New York judgment since the foreign court had lacked jurisdiction over the defendant's person. In reaching its decision, the Court relied upon the U. S. Supreme Court case of *Barber v. Barber* (21 How. 582) and upon the common law of New York, no showing having been made that the common law of Nevada differed. Situations where the court granting the divorce decree had jurisdiction over both parties and where the wife had procured the foreign divorce were distinguished.

Constitutional Law. . . state which maintains separate schools for negroes and whites need not institute law school for negroes until there is a showing of some need therefor . . . negro has no constitutional right to be admitted to white school in absence of demand for separate negro school.

■ *Sipuel v. Board of Regents of University of Oklahoma*, Okla. Supreme Ct., April 29, 1947, Welch, J.

Petitioner, a negro, applied for admission to Oklahoma University Law School. Although she was fully qualified, admission was denied. Under the laws of the state, it would have been a crime for the authorities to admit her. She then sought a writ of mandamus to compel her admission on the ground that, since there was

no law school for negroes within the state, the denial of her application resulted in a violation of her rights within the Fourteenth Amendment. There was no showing that petitioner had notified the state's authorities of a desire to study law within the state or that others of her race had sought such education. Justice Welch stated that a state might legally maintain separate educational facilities for the two races, but that in doing so it was the state's duty to furnish equal facilities to both so that where, as here, education in law was afforded to whites within the state it must be afforded to negroes within the state. Under the law of Oklahoma, petitioner had a choice of attending a law school outside the state or of attending a separate law school within the state, in each case at state expense. Justice Welch held that there was no violation of petitioner's constitutional rights, however, since the state, in fairness to all taxpayers and in good faith, might defer installation of a separate school until it was notified of a need for it and the state authorities had not been notified of such a need. In answer to petitioner's argument that a demand would have been fruitless and vain, since the authorities did nothing when she brought the proceeding, the Court said that petitioner had no right to anticipate a refusal by the authorities, that she had not indicated a desire or willingness to attend a separate school, and that the action embraced only her claimed right to enter the University. The case of *Missouri ex rel. Gaines v. Canada* (305 U. S. 337) was distinguished on the ground, among others, that there the authorities had discretion either to provide facilities in the state or to require attendance outside. The judgment of the trial court denying the writ was affirmed.

Constitutional Law. . . where state law provides only for segregation of Indians and certain Asiatics, segregation of school children of Mexican descent violates the Fourteenth Amendment although equal facilities are provided.

■ *Westminster School District v. Mendez*, C.C.A. 9th, April 14, 1947, Stephens, C. J. (Digested in 15 U.S. Law Week 2604, April 29, 1947.)

California law requires Indians under certain conditions and children of certain Asiatic parentages to attend separate schools. In a suit brought against California school officials by a number of children who were U. S. citizens of Mexican descent, the lower court found that the officials had adopted a common plan and common rules and regulations requiring persons of Mexican descent to attend segregated schools and that petitioners' constitutional rights had been violated thereby. Upon appeal, the officials contended that the suit was not authorized by law to redress the alleged deprivation of constitutional rights. A U. S. statute provides that a person "who under color of any statute, ordinance, regulation, custom or usage of any State," deprives another of "rights, privileges, or immunities secured by the Constitution and laws shall be liable to the parties injured . . ." (28 U.S.C. § 43). Citing *Home Tel. & Tel. Co. v. Los Angeles* (227 U. S. 278) and *Screws v. U. S.* (325 U. S. 91), the Court held that, despite the fact that the segregation was not authorized by California law, the acts were performed under color of state law since they were undertaken in the performance of official duties and hence were not personal acts of the officials. The officials contended also that the conclusions of the lower court were not supported by the findings of fact inasmuch as the evidence showed without conflict that petitioners were furnished facilities equal to those furnished other school children and it was settled that segregation was permissible so long as facilities were equal. The Court pointed out that the cases upholding such segregation involved segregation along divisional lines of the great races of mankind and distinguished the instant case on the ground that the segregation here practiced violated state law. The judgment of the lower court was affirmed.

(For another recent case construing "under color of law" and, in reliance upon *Screws v. U.S.*, *supra*, upholding a conviction, see *Crews v. U.S.*, C.C.A. 5th, April 5, 1947, Waller, C. J., digested in 15 U.S. Law Week 2572, April 15, 1947. In this case, Judge Waller states: "The defendant, although guilty of a cruel and inexcusable homicide, was indicted and convicted merely of having deprived his helpless victim of a constitutional right, under strained constructions of an inadequate Federal statute, and given the maximum sentence under that statute of one year in prison and a fine of \$1,000." The statute involved was 18 U.S.C. § 52, which makes it a federal crime to deprive a U.S. citizen, under color of law, of rights secured or protected by the Constitution and laws of the United States.

Corporate Reorganization. .voting trusts in Chapter X reorganization under the Bankruptcy Act not prohibited by Congress. .voting trust approved under circumstances of particular case.

■ *In re Quaker City Cold Storage Co.*, U.S.D.C., E. Pa., March 28, 1947, Kalodner, C. J. (Digested in 15 U.S. Law Week 2572, April 15, 1947.)

A reorganization plan under Chapter X of the Bankruptcy Act provided that the new stock would be issued subject to a voting trust. The Securities and Exchange Commission alone objected to this provision. Judge Kalodner stated: "The Commission's objections are fundamentally based on opposition to voting trusts generally and on principle . . . I cannot agree that the creation of a voting trust amounts to the same thing as issuing non-voting stock, or that Congress in prohibiting non-voting stock inferentially intended to prohibit voting trusts. There is a wide difference between disfranchising a class of stockholders completely, and designating trustees to exercise the voting power of the class . . . Moreover, . . . Congress expressly provided for scrutiny of the manner

of selection of 'the persons who are to be . . . voting trustees' . . . I agree that voting trusts should be employed sparingly and only when special circumstances require." He found that the exceptional factors in this case called for a voting trust, since a majority of the persons to whom the stock would be issued had never before exercised any voice in the management and control of the debtor, a majority of the stock would be scattered among many individuals with small holdings, and control would otherwise probably revert to the minority railroads whose interest in the debtor was not that of investors but of carriers desirous of maintaining a traffic source. Agreeing that such a trust was "undemocratic" if the stockholders were helplessly shackled to it, Judge Kalodner found their interests adequately safeguarded by the requirement that referenda be conducted on major matters and by the provision that the trust could be terminated on a vote of a majority of the trust certificates.

Criminal Law. .Uniform Criminal Extradition Act. .state enactment providing for extradition of person not a fugitive from justice supplements, rather than conflicts with, federal enactments on extradition.

■ *English v. Matowitz*, Ohio Supreme Ct., April 23, 1947, Hart, J. (Digested in 15 U.S. Law Week 2626, May 13, 1947.)

Petitioner was arrested upon a warrant of extradition issued upon the requisition of the Governor of Pennsylvania, and issued under an Ohio statute which provided for extradition of a person charged with a crime by the demanding state but who was not a fugitive from the justice thereof. The Pennsylvania indictments charged petitioner with having committed the offenses in Pennsylvania while he was in Ohio. Petitioner sought a writ of habeas corpus claiming that the Ohio act under which the warrant was issued was unconstitutional because con-

flicting with Section 2 of Article IV of the U.S. Constitution requiring extradition in the case of flight from justice and because the federal enactments covered the entire field of extradition. The Court denied the writ. It held that the federal enactments did not cover the situation where the offender was not a fugitive from justice and that therefore the federal and state enactments were not in conflict but supplemented each other. It pointed out that the Ohio statute involved was the Uniform Criminal Extradition Act which had been adopted by thirty-one states. It held that Congress had exhausted its constitutional power on the subject and that all additional power was reserved to the states. The court remarked, however, that, even if the constitutional power had not been exhausted by Congress, the state would have had power to adopt enabling or supplemental legislation.

Department of Commerce. .delegation of authority for handling tort claims.

■ Code of Federal Regulations, Tit. 15, Subtit. A, Pt. 13, §§ 13.1-13.7 (12 Fed. Reg. 3080).

In the *Federal Register* of May 10, 1947, the Department of Commerce announced that the head of each primary organization unit was authorized to exercise all authority vested in the Secretary by § 403 (a) of the Federal Tort Claims Act as to claims arising out of acts or omissions of employees in his organization and that the Solicitor of the Department was authorized to exercise such authority as to claims arising in the constituent units of the Office of the Secretary excluding the Office of Technical Services, which was to be considered a primary organization unit. Further review in the Department is not permitted. The announcement embodies the regulations governing the procedure for making claims and for their adjudication and settlement. They became effective May 9, 1947.

Federal Procedure . . . jury trial . . . demand for jury trial timely though made more than ten days after service of the last pleading, where issue triable by jury is presented only after amendment of complaint and demand is made within ten days of amendment . . . F.R.C.P. did not obliterate difference between law and equity.

■ *Bereslavsky v. Caffey*, C. C. A. 2d, May 7, 1947, Frank, C. J. (Digested in 15 U.S. Law Week 2640, May 20, 1947.)

On August 8, 1944, petitioner brought suit in a U. S. District Court to enjoin infringement of his patent and to recover profits and damages. Upon the expiration of the patent petitioner moved to amend the complaint by striking the prayer for injunctive relief and by substituting an allegation that the action was solely to obtain money relief. On the day that the court granted the motion, petitioner filed a demand for a jury trial but the Court struck it out as not filed within ten days after the service of the last pleading. Petitioner filed a petition in the Circuit Court of Appeals for a writ of mandamus directing the judge to vacate the order. The Court held that petitioner was entitled to the writ since he did not become entitled to a jury trial until he amended his complaint so as to abandon his prayer for equitable relief and that his demand for trial by jury, made within ten days after the right arose, was timely. Judge Frank stated: "Defendant seems to suggest that the Rules have completely obliterated, for all purposes, the historic differences between 'law' and 'equity.' We cannot agree. Those who favor it should have in mind that such obliteration might deprive us of the inestimably valuable flexibility and capacity for growth and adaption to newly emerging problems which the principles of equity have supplied in our legal system."

Habeas Corpus . . . where face of petition shows grounds were at all times within knowledge of petitioner and no reason for delay in alleging them is shown, court has discretionary pow-

er to deny habeas corpus petition because of abuse of privilege of writ through filing of successive petitions, although instant petition sets up new grounds.

■ *Price v. Johnston*, C. C. A. 9th, May 5, 1947, Healy, C. J. (Digested in 15 U.S. Law Week 2652, May 27, 1947.)

Petitioner was serving a sentence of sixty-five years for bank robbery and assault and kidnapping incidental thereto. The present petition, the fourth for a writ of habeas corpus, raised questions substantially the same as those raised by the second petition, but in an amendment to the petition a wholly new ground for discharge, i.e., that the government had knowingly employed false testimony at the trial, was interposed. The Court found that petitioner was present and was represented by counsel of his own choosing throughout his trial, that on the face of his showing it was apparent that he knew as much about the misconduct at the time it was said to have occurred as he now knew, and that no reason was advanced for the failure to set up the misconduct in one of the prior petitions. The Court held that, where there had been repeated petitions with an apparent husbanding of grounds, there might properly be cast on the applicant the onus of satisfying the court that an abusive use was not being made of the writ. It stated: "We are not here concerned with a compulsive principle analogous to *res judicata*, nor with some empty formula to be applied without reflection or as a matter of course. We are speaking rather of a discretionary power resting in the conscience of the judge, to be exercised in light of the circumstances of the particular case and on grounds which square with reason and justice." Denman, C. J., dissenting, was of the opinion that the majority opinion created a presumption that a petitioner knew the facts constituting the wrong alleged in a second petition at the time he filed the first petition unless the time of acquiring knowledge is alleged in the second. He pointed out that the

petition was dismissed without permitting its amendment to show when knowledge was acquired. Judge Denman felt that the Court was following a continued line of decisions handed down since the increase of petitions for habeas corpus in the court although the Supreme Court had refused to uphold that line. Stephens, C. J., dissenting, was of the opinion that a petition for the writ could be denied where a former petition, based upon the same cause, had been heard, but that the court could not refuse to consider a petition merely because a former petition had been adjudicated.

Labor Law . . . employer's encouragement of union membership, even where union not company-controlled or one of two rivals, is unfair labor practice in absence of closed shop agreement.

■ *N. L. R. B. v. American Car & Foundry Co.*, C. C. A. 7th, April 30, 1947, Minton, C. J. (Digested in 15 U.S. Law Week 2628, May 13, 1947.)

The company contended that the word "encourage", as used in § 8 (3) of the National Labor Relations Act, which brands as unfair discrimination in tenure of employment in order to "encourage" or "discourage" membership in a labor organization, contemplates a situation where the employer encourages an employee to join a company-controlled union or one of two rival unions, and that the present situation, where the employee was not a member of another union nor the union a company-controlled one, did not violate the Act since no anti-union policy was involved. It thus contended that even if it did discharge the employee because he would not join the union, such action was not a violation of the Act. The Court held that the employer was enjoined by the Act to keep hands off in a matter of primary concern to the employees and that, in the absence of a closed shop or union shop agreement, in which case the Act excused discrimination, an employee could not be compelled to join a union. Major, C. J., dissent-

ing, was of the opinion that the reason for the employee's discharge was not his refusal to join the union.

National Labor Relations Board. . . agreement with N. Y. State Labor Relations Board.

■ Code of Federal Regulations, Tit. 29, Ch. II, Pt. 204, § 204.1 (12 Fed. Reg. 3443).

The *Federal Register* of May 28, 1947, contained the announcement that both the N.L.R.B. and the N.Y. State Labor Relations Board were of the opinion that there was nothing in the decision of the Supreme Court in the cases of *Bethlehem Steel Co. v. N.Y. State Labor Relations Board* and *Allegheny Ludlum Steel Corp. v. Kelly*, decided April 7, 1947, which forbade or disapproved such collaborative arrangements as were contained in the existing understanding between the two Boards. The understanding is set forth in an appendix to the separate opinion of Mr. Justice Frankfurter in the above cases.

National Mediation Board. . . regulations for handling representation disputes under the Railway Labor Act.

■ Code of Federal Regulations, Tit. 29, Ch. X, Pt. 1208, §§ 1208.1-1208.8 (12 Fed. Reg. 3083).

In the *Federal Register* of May 10, 1947, the National Mediation Board published rules and regulations dealing with the following matters: run-off elections, percentage of valid authorizations required to determine the existence of a representation dispute, repeat elections, necessary evidence of intervenor's interest in a representation dispute and the eligibility of dismissed employees to vote. They are effective from the date of publication.

Securities and Exchange Commission. . . new and amended rules adopted pursuant to Investment Company Act of 1940.

■ Code of Federal Regulations, Tit. 17, Ch. II, Pt. 270 (12 Fed. Reg. 3411).

In the *Federal Register* of May

28, 1947, the Commission announced the adoption and amendment of rules which deal with the procedure in respect to applications, the exemption of transactions with fully owned subsidiaries, and applications regarding bonus, profit-sharing and pension plans and arrangements. (See "Courts, Departments & Agencies", 33 A.B.A.J. 501, April, 1947.)

Veterans. . . Selective Training and Service Act of 1940. . . "super-seniority" . . . collective bargaining contract negotiated while veteran was in service is binding on veteran. . . veteran is not entitled to seniority over union official who is junior to veteran in service but his senior under such contract.

■ *Gauweiler v. Elastic Stop Nut Corp.*, C. C. A. 3rd, May 20, 1947, Goodrich, C. J.

While a veteran was in service, the corporation and the union which was the authorized collective bargaining agent of the corporation's employees entered into a contract which gave certain union officials plant-wide seniority. After the veteran had been reinstated, the corporation had been forced to lay off employees. Both the veteran and a shop steward, who was junior in service to the veteran but senior under the terms of the contract, were laid off. Subsequently, however, the shop steward was restored pursuant to the terms of the contract. The veteran brought suit under the Selective Training and Service Act of 1940 to recover damages and to obtain reinstatement. The Court stated that, although there was no case directly in point, the decisions in *Fishgold v. Sullivan Drydock & Repair Corp.* (328 U. S. 275) and *Trailmobile Co. v. Whirls* (decided April 14, 1947) showed that the Supreme Court was of the opinion that the Act protected the veteran to the same extent as if he had been continuously on the job. It held that the veteran was bound by non-discriminative arrangements made between the bargaining unit and the employer during his absence since his rights would have been fixed by the contract if he had remained continuously employed. This

result was said to be the only practical one for, if the veteran could displace a junior union official, he, himself, could be displaced by a senior non-veteran, over whom the union official had statutory seniority. The Court found that the contract was not discriminatory and that the provision was not arbitrary. McLaughlin, C. J., dissenting, was of the opinion that the Supreme Court cases, *supra*, upheld the veteran's right in this situation. He stressed the fact that the case involved the "extraordinary statutory security" given the veteran and that the provision relating to changed circumstances applied solely to restoration to the "position," not to "seniority."

(See also, *Koury v. Elastic Stop Nut Corp.* and *DiMaggio v. Elastic Stop Nut Corp.*, handed down by the same court on the same date. In the *Koury* case, the veteran had not been laid off but was seeking restoration to his former position. The Court held that he was not entitled to it as against a union official who was given seniority under the contract. And see *Payne v. Wright Aeronautical Corp.*, decided by the same court on the same date but by Maris, C. J., Kalodner, C. J., and Follmer, D. J., rather than Biggs, C. J., Goodrich, C. J., and McLaughlin, C. J. In the *Payne* case, the lower court had ruled in the veterans' favor. It found, however, that a non-veteran, who was not a union official, had a higher seniority in service than the veterans'. It had ordered that one of the veterans should replace a union official, who was his junior in service, but that the non-veteran should then replace the veteran. Upon appeal, the majority of the Court followed the *Gauweiler* decision. Follmer, D. J., dissenting, agreed with Judge McLaughlin's dissent in the *Gauweiler* case. He would solve the dilemma presented by three employees, one with contract seniority, one with absolute service seniority and one a veteran with seniority over the first but not the second, by applying the rule "that at all times the veteran retains his original rung on the ladder, the

non-veterans yielding their respective positions in accordance with the contract" so that "For each additional steward added to this picture the non-veterans must to that extent drop back in their respective order without disturbing the veterans on their respective rungs.")

Veterans. Selective Training and Service Act of 1940. . . reinstatement in former position is reasonable despite large increase in earnings to which the position will entitle veteran.

■ *Levine v. Berman*, C. C. A. 7th, May 6, 1947, Minton, C. J.

A veteran brought suit under the Selective Training and Service Act of 1940 for restoration to his former position as a rug salesman assigned an exclusive territory. Section 8 of that Act (54 Stat. 890, 50 U. S. C. App. 308) requires such restoration "unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." The employer had offered to assign him a territory and sufficient merchandise so that his earnings would not be less than they had been formerly. The offer was refused. The lower court found that, instead of selling a miscellaneous line of rugs, the company was now selling exclusively a particular brand, that the total sales in the territory formerly covered by the veteran had increased six times, that three salesmen now covered this territory and that demand for the rugs exceeded the supply so that it was now necessary to allot rugs among the territories. Upon these findings, the lower court held that the employer's circumstances had so changed as to make it

"impossible and unreasonable" to restore the veteran to his former position and that the offers made by the employer were as nearly like the veteran's former seniority, status and pay as possible. Upon appeal, the decision was reversed. The Court held that restoration to the former position was not impossible since the employer was still selling in the same territory a brand of rugs which it had previously sold. It held that, since there was no showing that the veteran could not dispose of the allotment allowed his former territory and since "unreasonable" meant more than having to share profits of an inordinately prosperous business, it was not unreasonable to require his reinstatement. Since formerly the veteran had received a ten per cent commission on the sales of this brand of rugs and since at the time of his demand some salesmen were receiving ten per cent commissions, the veteran was held to be entitled to a ten per cent commission although after the date of the demand all commissions had been cut to seven and one-half per cent. Briggie, D. J., dissenting, was of the opinion that the lower court's findings amply supported its conclusions of law. He said: "The territory of all other salesmen as well as rates of commission were reduced. Why not plaintiff? Plaintiff earned the last year of his previous employment \$4,922.83. Why should he now be entitled to a windfall of some \$30,000 per year? . . . the Act only requires that a returning soldier be restored to a 'position of like seniority, status and pay,'—not that he be placed on a pedestal, head and shoulders above

his co-workers. This is bound to spell dissent and dissatisfaction in any organization to say nothing of its injustice to others."

Further Proceedings in Cases Previously Reported

The following action has been taken by the U. S. Supreme Court:

Probable Jurisdiction Noted: *U. S. v. Petrillo* (33 A.B.A.J. 157, February, 1947).

U. S. v. U. S. Gypsum Co. (32 A.B.A.J. 880, December, 1946).

Certiorari Granted: *Clark v. Uebersee Finanz-Korporation* (32 A.B.A.J. 881, December, 1946), *Local 2880 Lumber & Sawmill Workers Union v. N. L. R. B.* (33 A.B.A.J. 156, February, 1947); *U. S. v. Di Re* (33 A.B.A.J. 372, April, 1947).

Certiorari Denied: *Friedman v. Schwellenbach* (33 A.B.A.J. 156, February, 1947), *Jones & Laughlin Steel Corp. v. United Mine Workers of America* (33 A.B.A.J. 157, February, 1947); *Bell v. Porter* (33 A.B.A.J. 158, February, 1947); *Bowers v. Remington Rand, Inc.* (33 A.B.A.J. 158, February, 1947); *Curley v. U.S.* (33 A.B.A.J. 277, March, 1947); *Commonwealth v. Bellino* (320 Mass. 635, 33 A.B.A.J. 372, April, 1937); *Jimenez v. U. S.* (33 A.B.A.J. 616, June, 1947).

Petition for Certiorari Dismissed: *U.S. v. Anderson and Mt. Clemens Pottery Co.* (33 A.B.A.J. 277, March, 1947).

The following action has been taken by the Sixth U.S. Circuit Court of Appeals:

Appeal in case of *Anderson v. Mt. Clemens Pottery Co.*, *supra*, ordered dismissed on motion by appellants.

Board of Governors Calls on The President

■ During their sessions in Washington, the members of the Board of Governors of our Association went to the White House by appointment on June 3, to pay their respects to The President of the United States. President Truman received them informally and chatted with them for about half an hour.

The visit was arranged for by State Delegate John T. Barker, former Attorney General of Missouri, now of the Department of Justice. While in the White House, Association President Carl B. Rix and the members of the Board called also on Clark M. Clifford, of St. Louis, The President's legal adviser, who has attended meetings of our Association and has many friends among its members.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

Is There "No Such Thing As International Law"?

■ Almost daily from May 12 to June 18, seventeen of the world's outstanding lawyers and juriconsults in the international field, with their expert staffs, have met in a conference room at Lake Success on Long Island, to discuss and formulate a practicable procedure for the progressive development and eventual codification of international law. They did not convene by their own choice or from an evangelistic fervor for something which they hoped to help bring into being. They were there because the great General Assembly of The United Nations, made up of statesmen and leaders of fifty-five Nations, had voted last December to create such a Committee to perform for it this procedural task as to international law. And the Governments of seventeen of the principal Nations had chosen these men and sent them to Lake Success to do the job.

As I listened to the earnest and able debates which took place from day to day and read the great quantity of mimeographed documents which contained the developing proposals and formulations, I found no room for doubting that these realistic and tough-minded jurists from many lands and diverse civilizations and legal systems *believe and know*, and accept as a basic fact, that there is a body of law in the world which is described generically as international law. One who heard their deliberations could hardly have come away with a conviction that these men were dealing with whimsy, cherishing an illusion or suffering from delusions, or that they had been commissioned and had come together to

codify what does not exist at all.

True, there was a variant view which ran through the Committee's deliberations and votes, and reflected a deep and basic division. On the part of the representative of the Soviet Union, and at times the representatives of Yugoslavia and perhaps Poland, there appeared to be an objective which may be stated thus: That there cannot be any international law of or in the future, unless and until it is put in the form of a convention signed by the USSR and the other Principal Powers, and that international law must not even be *stated* except in a form which the Soviet Union approves and is prepared to sign.

This recurring attitude has not seemed to me to be based necessarily on an intellectual conviction that international law does not exist. It could be due to a disapproval of the international law that does exist and a fear that it might be stated and codified and acquire therefrom an added authority and weight, even though Russia and the Communist-controlled states withheld approval of it. The Soviet spokesman seemed to regard all international law to date as having had only "capitalistic", "bourgeois", and "imperialistic" origins. He evidently feared action by the large majority of the Nations to state international law, in disregard of Russian views and votes (see "Fear of Encirclement"; pages 582-584 of our June issue).

So he did not want the existing international law even to be put to paper as such, under the auspices of The United Nations, lest it be in-

voked in some manner to prejudice or embarrass Russia and its "police state" satellites. For the future, he sought and contended that there can be no recognizable international law unless and until the Government of the Soviet Union has joined in creating it and the Principal Powers have pledged themselves to enforce it by arms if need be.

Thus there has appeared to be at Lake Success a lack of a common denominator, between the great majority of the assembled juriconsults, who recognize the existence and reality of international law and seek to state it and give it an added authority, and the minority who deny significance to the law developed slowly through centuries and assert that hereafter there can be international law only if and when the governments create it and back it with arms, and if the Soviet Union joins in so doing.

I have been unable to disassociate this essentially totalitarian concept of law from what I have heard and read as the expressions of some American lawyers. Even in the JOURNAL we have published denials of the existence of international law, because there is no government to enact it or armed strength to enforce it (see Samuel J. Kornhauser's article in our June issue; pages 563-566, 636-641). We have published like contentions as to the nature and origins of domestic law.

So we come back to the query: Did Elihu Root, Robert Lansing, Charles Evans Hughes, John Bassett Moore, Manley O. Hudson, and other great jurists of this and many other lands, work so magnificently for an illusion of law that had no existence or reality? Were hundreds of lawyers only chasing rainbows and vain hopes when they met in our Regional Group Conferences throughout the United States and Canada in 1944-45, to do all they could for a World Court with plenary jurisdiction to decide international disputes according to international law? Have the

lawyers of the Americas, whose efforts were narrated in this department in our May issue (page 502), been engaged for years in attempting to state and codify a non-existent body of law? Were the Nuremberg Charter and Judgment in vain except as the Soviet Union joined in them? Should our Association abandon now its own efforts, its Regional Group Conferences, and its cooperation with The United Nations, and accept the totalitarian concept that "there is no international law" and can be none until Governments create it and the Soviet Union consents?

No; at least for American lawyers, I believe that denial of the existence of international law stems from a failure to think clearly. Professor Herbert W. Briggs points out in this issue some of the basic errors underlying such a denial. I have asked Mr. Sohn, as the Editor-in-Charge of this department, to give also his answer to these questions which our lawyers should think about and face.

Before that, I report to our members that The United Nations Committee to formulate and recommend procedures for the progressive development of international law concluded its work at Lake Success on June 17. Its report is going to the member Nations, for the action of the General Assembly which reconvenes in September. The text of the majority report is not available at this writing (June 20), but it is understood to be along the following lines:

1. As recommended by our Association in 1945 (31 A.B.A.J. 227-228; May, 1945); and to the State Department by our Association on May 9, an International Law Commission (ILC) of fifteen persons of recognized competence in international law will be created, to have charge of the drafting; each Nation will have the right to nominate not more than two of its own nationals and not more than eight persons of other nationalities; the standards declared in the statute of the International Court of Justice to be followed; and the method of election will

resemble that by which judges of the International Court of Justice are chosen.

2. The active cooperation and assistance of non-governmental professional and scientific organizations, international and national in scope, will be invited and desired.
3. The Committee made no recommendation as to substance; it proposes that the General Assembly refer to the ILC the Panamanian formulation as to the rights and duties of states and the Secretariat's drafts as to "genocide".
4. Instructed by the Assembly, the Committee gave special attention to embodying in international law the principles of the Nuremberg Charter and Judgment and recommended that the ILC should be invited to prepare a Convention on that subject as well as a detailed plan of general codification of offenses against the peace and security of mankind; the Committee decided also to draw to the attention of the General Assembly the desirability of creating an International Criminal Court.
5. Plenary provisions were drafted by the Committee for organizing,

implementing and staffing the work of the ILC, and for proceeding as promptly as possible with the great task, as soon as the ILC is constituted; the hope is that the members of the ILC can be elected at some time during the sessions of the Second Assembly, which opens at Flushing Meadows in September.

The carrying forward of this work and the definitive results from it may be the world's best answer to denials of the existence, reality and efficacy of international law.

American judges and lawyers, in particular, should be sure that individually and collectively they have done and are doing all they can to give efficacy to international law and to the tribunals and institutions established to interpret, apply and enforce it. That cannot be done by dismayedly denying the very existence of international law or by proclaiming that there can be no such thing unless and until the governments expressly declare it in minor detail and are prepared to intervene with the force of arms if need be, in case of any violation of the legal rules and principles thus declared.

WILLIAM L. RANSOM

New York

There Is International Law and It Is Really Law

Ordinarily I try to stay away from meta-jurisprudential abstractions. Logomachy is not my favorite battlefield. When I am challenged to maintain or refute some "assertion" or "assumption", I try to stick as close to the ground as I can. From that point of view I comply with the request of our Editor-in-Chief and supplement what he has said by way of answer to his own question.

Whenever a group of lawyers gets together to discuss international affairs, I have found that usually at least one of them comes up with an assertion that there is no such thing as international law or that international law is not really law.

The validity of the second of these two contentions depends considerably on the definition given to the

word "law". In the 1945 issue of the *British Year Book of International Law* (pages 146-163), Glanville L. Williams, of the University of London, points out clearly that all the detractors of international law, from Austin on, have defined their idea of "law", of its "nature" or of its "essence", in a way which enabled them to exclude international law from the definition of "law properly so-called".

Only when all eminent jurists will agree on a definition of "law" that embraces not one type of law alone but all of them, will it be possible to be rid of denials that international law has substance and reality. In the meantime, we may be aided by a factual comparison between international law and

various branches of municipal (internal or national) law, in order to ascertain what kinds of rules are considered as "law" by those who observe them, what rules are habitually observed, what are the common reasons for non-observance, how much the observance of rules depends on the existence of adequate sanctions, etc.

The first thing we note is that each state of the world asserts that it has various *rights* which all the other states must observe towards it, and that each state of the world is in consequence obliged to agree that it has the correlative *duty* to respect as rights of other states all those rights which it claims for itself. These duties observed by states and the rights respected by them are not considered by the states as based on principles that are merely moral or as practical applications of prudence or fair dealing, but as essentially legal in character and origin. The branch of the law which describes and makes definitive these rights and duties in the international sphere is generally and correctly called "international law".

When we speak about states observing certain duties, we mean habitual, general observance. Individuals often violate municipal or domestic law by criminal acts, or by non-observance of contracts or other obligations of private law, just as some states from time to time violate international law. Even more than individuals, states are prone to claim a *legal* excuse for their action. Seldom does a state assert that it is above law; the states which have made such claims have been properly punished by the outraged Community of Nations, in instances that steadily increase in number and significance. Ordinarily, a state is more likely to defend legalistically its wrongful acts or omissions, either by denying the legal validity of the rule invoked against it or by appealing to the nebulous legal "right of self-defense".

A willful state may at times "get away with" doing things which would have been punished if they had been done by individuals. This

is due to a large extent to the fact that—as Professor Brierly, the Rapporteur of the United Nations Committee on the Progressive Development of International Law and Its Codification, has pointed out in his book, *The Outlook for International Law*; reviewed in 31 A.B.A.J. 126; March, 1945—international law is a *laissez-faire* system, regulating thus far only a small part of international relationships. In consequence, there is a wide sphere of freedom of action by Nations. In many instances a state does, and is allowed to do, virtually as it pleases, even though this may cause an injury to an important, but legally unprotected, interest of another state. Thus such matters as tariffs, immigration, access to raw materials, and other economic questions, are considered as within the "domestic jurisdiction" of states and outside the scope of international law.

The situation is different in modern times from that prevailing in the middle of the Nineteenth Century. By agreements between states—at first mostly bi-partite, later more and more multi-partite (see April JOURNAL, page 381)—different subjects not dealt with by the customary international law became regulated by international law. The ambit of international law has been constantly increasing. Since the establishment of The United Nations and of its various specialized agencies, the *tempo* of increase has been speeded up. We are still woefully behind in coping with the intricacies of our closely interdependent world; but we are developing, as fast as political considerations permit, a more efficient system of international legislation. A special Committee created by the General Assembly of The United Nations has lately been hard at work on improving the procedures and methods for developing and strengthening international law.

More and more, our lawyers are becoming acquainted with the sources of international law. Only a few have, however, a clear conception of the day-to-day practice of international law. They hear of the

big violations of international law, which make the front pages of the newspapers and influence the public's conception of how international law works or does not work. This is comparable to painting a picture of railroading in the United States on the basis of the few headlines relating to train collisions. The patient work of the railroad men who run thousands of trains a day safely and efficiently is not considered worth a headline.

Similarly, the thousands of actual or potential disputes which are adjusted from day to day and according to international law by the foreign offices and State Departments of the seventy-odd states of the world are unheard of by the general public. Even international lawyers, other than those working in the offices of the legal advisers to the governments, seldom know of them. Only a small percentage of the cases is published in official volumes of international documents and that, ordinarily, only after some twenty years have elapsed.

It is difficult to get excited about something that happened some twenty years ago; and only a few intrepid researchers delve into these records in a never-ending search for the evidence confirming some old rules of international law, and for the first traces of new ones. Likewise, thousands of disputes or claims between private citizens, or between citizens and governments, are settled quietly and unostentatiously according to rules and standards which the parties recognize and accept as international law.

Most international legal difficulties, excepting major ones at political levels, are settled according to international law, through correspondence between the foreign offices of the states concerned. Some of these disputes simply simmer because both parties do not dare to go to Court or because the allegedly guilty party cannot be brought to Court. If one of the parties insists on a judicial determination and has the backing of public opinion, the case is ordinarily brought before an arbitral tribunal or the World Court;

and the parties accept the judgment as an authoritative statement of the law binding upon them. In the few cases in which a defeated party has refused to abide by the judgment (i.e., in perhaps one-tenth of one per cent of adjudicated cases), the state concerned has always based its non-compliance on legal grounds (for instance, that the decision was *ultra vires*) and not on an assertion of its privilege to do as it pleases regardless of international law. Even in those extreme instances states have admitted the general proposition that international law is binding upon them and try to find in it a remedy for their grievances or a justifi-

cation for their course of action.

No, it is not in a *non-existence* of international law that the weakness of our international system lies. The institutions thus far built to support law in the international sphere are the weak pillars of the structure. We do not have a definitive statement or codification of the law. We do not yet have true legislative bodies which are empowered to cope with the problems of progressive development and peaceful change in the law. We do not yet have a World Court endowed with plenary and compulsory jurisdiction over all international disputes susceptible of legal solution. We have not set up the

means of enforcing international decisions, rendered according to law, against the most dangerous violators of international law. Men and Nations who speak about the failures of international law, or deny the reality and substance of its existence, should look into their own hearts and search whether they have always supported all the measures which are necessary to create and foster a climate in which international law will be able to accomplish its difficult tasks. But few would be able to end that self-analysis without saying: *Mea culpa*.

LOUIS B. SOHN

Cambridge, Massachusetts

Bar Association News



W. W. SHARP

Bar Association of Arkansas

■ The 49th Annual Meeting of the Bar Association of Arkansas was held May 1-3 in Little Rock. The first day was devoted to the Section of Taxation, which had arranged a series of papers on current federal

and State taxation problems. Bolin B. Turner, Presiding Judge of the United States Tax Court, addressed the session.

The Little Rock Association of Women Lawyers gave a luncheon in honor of Chancellor Ruth F. Hale, newly appointed, the first woman judge in Arkansas (see 33 A.B.A.J. 274; March, 1947).

W. W. Sharp, of Brinkley, was elected President, and Archie House, of Little Rock, Vice President. Terrell Marshall, of Little Rock, was re-elected as Secretary-Treasurer.

Bar Association of the State of Kansas

■ With the largest membership in its history, the Bar Association of the State of Kansas held its 65th Annual Convention May 23-24 in Topeka. Attorney General Tom C. Clark was the featured speaker at the Annual Banquet. The newly-elected officers of the Association are: President, Dallas W. Knapp, of Coffeyville;

President-Elect, Thomas M. Lillard, of Topeka; Vice-President, W. D. Vance, of Belleville; Secretary-Treasurer, Beryl R. Johnson, of Topeka.

Kentucky State Bar Association

■ On April 3-4, the Kentucky State Bar Association held its 1947 Annual Meeting, with C. C. Duncan, of Monticello, presiding. A leading event was a panel discussion of "Industrial Peace for America", with Frank Donner, Assistant Counsel for the CIO, and Robert D. Morgan, of Chicago, presenting their respective views.

Another panel discussion was held on "Does Kentucky Need a New Constitution?" The State is to vote on the question this fall. The affirmative was taken by Eldon S. Dummit, Attorney General of Kentucky, and the negative by Judge E. C. O'Rear, of Frankfort.

Judge John J. Parker, of the Fourth Circuit, delivered the address at the Annual Banquet on the "Nuremberg Trials".

The following officers were elected: President-Elect, George S. Wilson, Jr. (to take office April, 1948); Vice President, Joseph D. Harkins; Secretary, Samuel M. Rosenstein; Treasurer, Henry H. Harned.

Practising lawyer's guide to the current LAW MAGAZINES

ADMINISTRATIVE LAW—*"The Atomic Energy Act of 1946"*: The lively *Journal of the Bar Association of the State of Kansas* contains in its quarterly (February) issue (Vol. XV—No. 3; pages 255-260) an informative and analytical contribution on the above subject by William Tucker Dean, Jr., Assistant Professor of Law in the University of Kansas School of Law. The author's "approach" to his explanation of the American statute is skillful in that he shows the interest of the people of Kansas in the control of atomic energy, even though no atomic energy plants are situated in the State and no uranium has been reported as found there. Also worthy of note is Professor Dean's observation that the Administrative Procedure Act is applicable to the United States Atomic Energy Commission, and the judicial review provisions of the Procedure Act (Section 10) is made effective as to all Commission acts of a contested character. It was announced on June 23 that the author of the article has won the 1947 Ross Essay Prize. (Address: The Journal of the Bar Association of the State of Kansas, 1501 East Douglas Street, Wichita, Kansas; price for a single copy: \$1.00).

ADMINISTRATIVE LAW—*The Administrative Procedure Act—"Legislative Injustice and the Supremacy of 'Law'"*: The expected attack by left-wing academicians in concert, against the Administrative Procedure Act, is well under way in some of the law reviews, for the evident

purpose of building up a body of "professorial" authority which can be cited by the writers of judicial opinions as support for sabotage or limitation of the Act. In many respects the worst-tempered of these onslaughts is contributed by Julius Cohen, Professor of Law at the University of Nebraska, former counsel of the Manpower Commission and the Alien Property Custodian, to the March issue of the *Nebraska Law Review* (Vol. XXVI—No. 3; pages 323-345). The author proclaims his discussion to be an "appraisal" of the new Act, but he boldly tries to "ride two horses" in arguing that the Act is thoroughly bad because of what it expressly provides but that its provisions should not be judicially interpreted to mean any such thing as they say, anyway. Naturally, an article written for such a purpose and in such a spirit does not cite or quote from the many authoritative contemporary expressions of the legislative content as contained in this JOURNAL, and does not quote from the reports of the Senate and House Committees which would negative his contentions. Reflecting his wholesale condemnation of the Act but hardly characteristic of his indiscriminating abuse of it is his following summary:

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

If it was the intent of the authors of the Act to create a workable system of administrative procedure, they have failed; if it was their purpose to contract the area of administrative independence and to broaden the area of judicial intrusion in administrative activity, they have succeeded. The Act side-steps administrative realities; its approach is grossly horizontal instead of carefully vertical; it prescribes uniform treatment to agencies irrespective of differences of age, functions, needs and administrative ills. Indeed, there perhaps was a method to the madness of tying the administrative process into knots—and that was to deliver it over to the judiciary. And so much was delivered that it is doubtful that the Court will avail itself of all that was intended by the donor to be put to use.

The article may be found interesting, if not useful, by those who will defend the integrity and efficacy of the Act and wish to familiarize themselves with the worst that is said against it. (Address: Nebraska Law Review, Lincoln 1, Neb.; price for a single copy: \$1.00).

ADMIRALTY LAW—*Common Law v. Admiralty Doctrines—State and Federal Courts—"Divided Damages in Maritime Cases"*: The continued confusion in the field of maritime law relating to the application of the admiralty doctrine of divided damages or the common law doctrine of contributory negligence in ship collision cases where both parties were negligent, is well discussed in the May issue of the *Virginia Law Review* (Vol.33—No. 3; pages 289-301). The author, the late S. Hasket Derby, of the California Bar, pointed out that the confusion is caused by

the failure of the Supreme Court to affirm or overrule its decision in *Belden v. Chase* (1893), a case of doubtful validity as a binding precedent in view of later Supreme Court decisions on related matters. In the *Belden* case the Court held that if collision cases where both parties were at fault are brought in the admiralty Courts, the damages will be equally divided; but that if such cases are tried in the State Courts or on the law side of the federal Courts, the doctrine of contributory negligence applies and neither party can recover. As a result of later Supreme Court decisions to the effect that federal law applies in State Courts as to causes involving (1) burden of proof in cases of seamen, and (2) assumption of risk and contributory negligence in cases under the Jones Act, some State Courts have held that it applies to a defense of contributory negligence in collision cases. This refusal by some State Courts to follow *Belden v. Chase* requires, according to the author, the Supreme Court to affirm or overrule its decision in that case. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy: \$1.00).

AERONAUTICAL LAW—*Legal Aspects of Airport Operations and Control*—"Keep Your Airports Free": A useful but in some respects controversial article under the title above quoted is in the June issue of *Flying* (Vol. 40—No. 6; pages 43 and 54), a National aviation magazine. The author is Leonard R. Hartenfeld, now of the District of Columbia Bar, formerly an adviser on airport law in the Navy Bureau of Aeronautics. He inveighs against private "monopolistic" control of local commercial airports, but gives some "points" for lawyers who deal with airport problems for municipalities, commercial bodies, property-owners or other private clients. (Address: Flying, 185 North Wabash Avenue, Chicago 1, Ill., price for a single copy: 25 cents.)

AGRICULTURAL LAW—*Constitutional Limitations—"Interstate Trade Barriers Affecting the Sale of Live-stock Remedies"*: In the *University of Kansas City Law Review* for December-February (Vol. XV—No. 1; pages 25-51), Elwyn L. Cady, legal research member of the Animal Health Institute, reviews, State by State, the laws and regulations governing the manufacture and sale of live-stock remedies. In some States, he finds, the legislation seems more designed to prevent the sale and distribution of biological products than to maintain their potency and purity. Although many biologic items are manufactured under federal specifications, supervision and approval, these States nevertheless require, before such products can be marketed in the States, that the manufacturers and distributors shall bear an additional license expense which in no way improves the quality of the remedies. The market for live-stock remedies is said to be hampered by a variety of dissonant State laws and regulations.

Several avenues of action to reduce such barriers to interstate commerce are pointed out by Dr. Cady: "The States could pass uniform laws and enforce them in uniform patterns. The States could repeal existing laws and allow the federal activities to continue as they might. Or the Congress could declare the manufacture, distribution and use of live-stock remedies to be a federal responsibility and enact one law which would uniformly cover the nation". The author points out that these suggested remedies would be applicable also to the interstate barriers which affect other commodities, because there is scarcely a marketed article of commerce or industry which is not held down by like restrictions. The discussion instances the commendable disposition of many law reviews to deal in part with mundane subjects which may confront practising lawyers in an agricultural or manufacturing region. Perhaps significantly, the author does not suggest, as a possible remedy, that the

Congress restore plenarily to the States the protection of the public interest as to live-stock remedies and like products, to the end, that as he does suggest, the States may deal with the matter through uniform State laws. (Address: University of Kansas City Law Review, University of Kansas City, Kansas City 4, Mo.; price for a single copy: 35 cents.)

CARRIERS—"Recent Federal Regulation of the Petroleum Pipe-Line as a Common Carrier": The March issue of the *Cornell Law Quarterly* (Vol. XXXII—No. 3; pages 337-377) contains a discussion by Professor Theodore L. Whitesel, of the University of Arkansas, of the regulatory problems in the petroleum pipe-line field. By the Hepburn Amendment of the Interstate Commerce Act in 1906 oil pipe-lines were made common carriers and their rates and service subjected to the regulatory jurisdiction of the Interstate Commerce Commission. The author reviews the limitations placed on the Commission's jurisdiction by the Supreme Court in the *Pipe-Line* cases in 1914 (234 U.S. 548) and expresses the view that the Court should now accord to the Commission unequivocal jurisdiction over all interstate pipe-lines to reflect economic changes which have since taken place. After outlining the regulatory activities of the ICC under the Hepburn Amendment and the Elkins Act with respect to rates and practices and proceedings instituted by the Department of Justice under the anti-trust laws, Professor Whitesel concludes that Federal regulation of the petroleum pipe-lines has not been wholly effective, particularly as concerns the maintenance of competition between integrated oil company owner-shippers and independent oil producers. Divorcement of the pipe-lines from refining company ownership and the supply by the Federal government of new pipe-line facilities are mentioned as possible alternatives to the present regulatory system. (Address: Cornell Law Quarterly, Ithaca, New York; price for a single copy: \$1.00).

COMPARATIVE LAW — *Post-War Changes and Trends in Foreign Law and Legal Systems*: A substantial service to the practising profession as well as to legal scholars is being rendered in the above indicated field, by the *Wisconsin Law Review*. Its March issue (Vol. 1947—No. 2) contains "The Trend of the Law in the USSR" (pages 223-243), by John N. Hazard, of the New York Bar, Professor of Public Law at Columbia University, member of the Moscow Juridical Institute (1935-37). The same issue offers also "The Trend Toward Nationalization in the Law of The Netherlands", by Henry Van Dam, of the District of Columbia and New York Bars. Both articles reflect seasoned scholarship, scrupulous fairness, and competent selection and sorting of data. Professor Hazard concludes that "there is increasingly evident in Soviet textbooks, supported by Court decisions, a desire to provide the environment suitable for a stable society." He thinks that "one may anticipate the evolution of principles of law which will be understandable to lawyers of the West, particularly those with a tradition of Roman law". A reader lays down this exposition of Soviet law with an uneasy feeling that Professor Hazard has revealed, perhaps without intention, that the legal concepts of the USSR are having, and to a considerable extent have already had, an imponderable impact on American law particularly in the Constitutional and National sphere. On the other hand, Mr. Van Dam reassuringly declares, from his careful and objective review of developments to a recent date, that "the conclusion seems justified that far-reaching proposals for nationalization, which are not based on an emergency, will not be accepted by The Netherlands". Both articles are in the stimulating field of notable studies which are being made as to the changes in law and legal systems in various European areas, by a committee of our Association's Section of International and Comparative Law. It is understood that

other articles will follow in the Wisconsin series, which no thoughtful lawyer who wishes to look ahead and keep abreast of what is taking place in the world should neglect. (Address: Wisconsin Law Review, Madison, Wis.; price for a single copy: 75 cents).

CONSERVATION LAW—*Public Control of River-Basin Development—"A Symposium on Regional Planning"*: The January issue of the *Iowa Law Review* (Vol. 32—No. 2; pages 193-406) contains an authoritative discussion of the historical, economic, political and legal aspects of regional planning and development, with particular emphasis on river-basin control. Acknowledging that there is a growing "grass roots" agitation for a wider and more equitable sharing of our Nation's wealth through planned development of natural resources, the articles contributed to this symposium suggest that the problem presented is "what pattern or patterns of organization, interstate, federal, or interstate and federal, can best answer the needs which government generally is being called upon to meet". The weight of opinion appears to favor the multi-purpose, region-wide public authority integrating federal, State and local powers. Perhaps of chief interest to practising lawyers are "The Settlement of Disputes Between States Concerning Rights to the Waters of Interstate Streams", by Julius M. Friedrich and "TVA in Court: A Study of TVA's Constitutional Litigation", by Messrs. Joseph C. Swidler and Robert H. Marquis. (Address: Iowa Law Review, Iowa City, Iowa; price for a single copy: \$1.75)

CONSTITUTIONAL LAW — *Regulation of Prices and Rationing of Supply—"The Fight Against Inflation"*: Price control as administered by the OPA during the war years was undoubtedly the most com-

prehensive governmental control to which Americans have ever been subjected. In retrospect, Bruno V. Bitker gives an analysis of this regulation, in the March issue of the *Wisconsin Law Review* (Vol. 1947—No. 2; pages 183-211). The enforcement of rent, rationing and commodity-price control is discussed, with particular emphasis on unusual features such as treble damages and license suspensions. Leading cases on the constitutionality of the many aspects of price control, including the exclusive jurisdiction of the Emergency Court of Appeals, are considered. The author concludes with a comparison of price trends during World War I and World War II, which he looks on as indicating that price control is effective in preventing inflation. (Address: Wisconsin Law Review, Madison, Wis.; price for single copy: 75 cents).

CONSTITUTIONAL LAW—*"Commerce Regulation before Gibbons v. Ogden: Interstate Transportation Facilities"*: In the February issue of the *North Carolina Law Review* (Vol. 25—No. 2; pages 121-171), Professor Albert S. Abel, of West Virginia University, attacks the "too prevalent tendency" to believe that *Gibbons v. Ogden*, decided in 1824, was the first Supreme Court decision to deal with the commerce clause, "because primitive conditions and want of concern with interstate carriage before that time dispensed with any considerable degree of activity and hence with any occasion for passing on what we have since come to regard as commerce clause issues." On the contrary, says the author, before that decision "there was regulation of interstate transportation facilities in nearly as great variety and profusion as there is now; but it was not properly commerce regulation because that subject was not really commerce until Chief Justice Marshall made it so." Professor Abel finds support for his conclusion in State and federal legislative and

executive action in the thirty-odd years prior to Marshall's opinion which gave to the commerce clause a practical construction that left the States practically unfettered in the establishment, disestablishment and maintenance of interstate transportation routes. For his sources, the author has used principally State statutes with respect to interstate public highways, turnpikes, canals, bridges and ferries, and similar Congressional enactments for the District of Columbia. The detailed nature of these early regulatory measures adopted by the States highlights the significant departure from contemporary interpretation of the commerce clause involved in Marshall's definition that "commerce is intercourse" and its attendant expansion of federal powers. (Address: The North Carolina Law Review, Chapel Hill, N. C.; price for a single copy: 80 cents).

CONTRACTS — "*Changes, Changed Conditions and Extras in Government Contracting*": In the March-April issue of the *Illinois Law Review* (Vol. XLII—No. 1; pages 29-52), Leslie L. Anderson, of the Minnesota Bar (Minneapolis), formerly a Major in the J.A.G.O., contributes a practical article under the above title. It contains concrete and useful material, virtually down-to-date, as to the legal problems arising in post-war contracting with the government. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: \$1.00).

DOMESTIC RELATIONS LAW — "*A Survey of Alienation of Affections Restrictive Legislation*": Howard Newcomb Morse, of the Georgia Bar (Augusta), has written a well-annotated article for the February issue of the *Georgia Bar Journal* (Vol. IX—No. 3; pages 300-304). He

notes particularly that the Illinois statute against actions for alienation of affections has been held to be unconstitutional, although corresponding statutes of seven other States have either been declared constitutional or have not had their constitutionality challenged. (Address: Georgia Bar Journal, Persons Building, Macon, Ga.; price for a single copy: 50 cents).

EVIDENCE—"*Privileged Communications*": A comprehensive examination of Court decisions relating to the New York statute (Section 352 of the Civil Practice Act) concerning "privilege" is in the April issue of the *Insurance Law Journal* (No. 291; pages 291-316). Francis R. Stoddard, of the New York Bar, a former State Superintendent of Insurance, presents his analysis of the statute from an insurance law-suit point of view. In so doing, he discusses two aspects of the problem of determining the scope of the application of the statute: The first is as to how far the New York Courts have gone in permitting a doctor, dentist or professional nurse to testify concerning his or her patient, or in receiving into evidence public or private records concerning the illness of the patient, when the patient or his legal representative has made no express waiver of the privilege afforded by Section 352. In the second part of his article, Mr. Stoddard discusses the manner in which a waiver of privilege is made, and gives a splendid collection of the New York cases on both angles. (Address: Insurance Law Journal, Commerce Clearing House, Inc., 214 N. Michigan Avenue, Chicago 1, Ill.; price for a single copy: \$1.00).

INSURANCE LAW—"*Accidental Means in New York—A Rational Approach*": This article in the March number of the *Cornell Law Quarterly* (Vol. XXXII—No. 3; pages

378-395) analyzes the leading New York cases as to what constitutes "accidental means", in cases where a person sues on a policy of accident insurance which by its terms required the insured to suffer an accident through accidental means before there is any liability under the policy. The early New York view was that a substantial difference existed, for insurance contract purposes, between an accident and the means which produced it. Thus, recovery on accident insurance policies was denied in cases where the insured was injured by doing such things as lifting a heavy weight, riding a bicycle, or undergoing an anaesthetic. Lately the New York Courts have shown a tendency to abolish the distinction between accidental means and accidental result in most cases. The author, George S. Van Schaick, of the New York Bar, former State Superintendent of Insurance, has given an analysis of the New York cases which should be helpful to lawyers engaged in accident insurance litigation. (Address: Cornell Law Quarterly, Ithaca, N. Y.; price for a single copy: \$1.00).

LABOR RELATIONS LAW — "*The Improvement of Collective Bargaining—Addresses at the Omaha Regional Conference*": The debate on the improvement of collective bargaining, which took place before the Omaha Regional Meeting of our Association on January 25, is being published substantially in full in the *Rocky Mountain Law Review* (Boulder, Colorado), the *Missouri Law Review* (Columbia, Missouri) and the *Nebraska Law Review* (Lincoln, Nebraska). The participants were Robert D. Morgan, of the Illinois Bar (Peoria), and Lee Pressman, general counsel for the CIO and the delegate of the Section of Labor Relations Law to the House of Delegates. Members of the Bar may obtain the text of the discussion from any of the above-mentioned law reviews.

LABOR RELATIONS LAW—*Labor Dispute Settlement—Opposition to Compulsory Arbitration:* The end of May brought the issuance of the Spring number of *Law and Contemporary Problems* (Vol. XII—No. 2) quarterly publication of the Duke University School of Law, with a symposium as usual on a critical post-war domestic issue. This symposium, organized by Paul H. Sanders, formerly of the Duke faculty and now of the Atlanta Bar, and edited by Professor Brainard Currie, is avowedly and aggressively in opposition to compulsory arbitration of labor disputes.

Eleven articles by competent opponents of obligatory settlement by arbitration state grounds of opposition, with the views of organized labor and those who follow its "line" predominant. Although Owen Fairweather and Lee C. Shaw, of the Chicago Bar, are among the contributors, care was evidently taken to select only opponents of compulsory arbitration. There is an analysis of current legislative proposals, with emphasis on their inclusion of machinery for compulsion in settlement.

Irrespective of the pros and cons of compulsory arbitration of labor disputes, on which neither this department nor our Association has taken a stand, the significance of this use of the well-regarded publication of a leading law school should be noted. Who has made the decision that the Law School should assemble and publish a symposium wholly to oppose compulsory settlement of labor disputes—the law faculty, the student body, the University authorities, the law alumni of Duke? Weight is given to such a query by the school's announcement that "By arrangement with Congressman Richard M. Nixon, of California, an alumnus of the Duke Law School, copies of this issue of *Law and Contemporary Problems* are being supplied to all members of Congress." Are the journals of law schools to adopt and extend the practice of issuing in the name and with the prestige of the school wholly one-

sided presentations of great public questions in the field of law—questions on which differing opinions are held by lawyers, including probably alumni of the school—and then "arranging" for the distribution of such an argument to all members of the Congress at a time when the subject-matter is one of the major topics under legislative consideration at the stage of action? This department will regret the departure of such law reviews from the category of law school publications containing material useful to practising lawyers in their work for clients. (Address: *Law and Contemporary Problems*, Duke University School of Law, Durham, N. C.; price for a single copy: \$1.00).

LABOR RELATIONS—"*On Teaching Labor Law*": What must a lawyer know to serve adequately and effectively the best interest of his client in the field of labor relations? The answer is basic to the consideration of the subject-matter of the leading article in the March-April issue of the *Illinois Law Review* (Vol. XLII—No. 1; pages 1-28), by W. Willard Wirtz, Professor of Law at Northwestern University. There was a time when the chief concern of a lawyer in the field of labor relations law was to help to settle labor disputes after they arose and to invoke the aid of the Courts in the event of strikes, picketing, lockouts or boycotts. Today the chief function of the attorney engaged in management-labor relations is with everyday *labor relations*, such as collective bargaining negotiations, drafting contracts with unions, arbitrations under labor contracts, and conducting the day-to-day dealings between management and labor in harmony with statutory requirements and fair play. These are the normal labor relations to be handled in such a way as to prevent resort to "self-help" and "economic-force" techniques by management or by labor.

How much of this can or should a law school undertake to teach? What is the best method of teaching the subject-matter of an adequate course in labor relations law? Thus far the matter has been left to the individual teacher. As a result the courses in labor law vary with the teacher and the school where they are taught.

Professor Wirtz would delegate the task of formulating the course in this field to a group of teachers who by training and experience are especially qualified for the work. The task of such a group would be to write a case-book as a joint effort, thus developing new materials and techniques as may be determined to be essential. He makes an earnest case in favor of such a procedure—one that deserves the serious consideration of those vitally interested in perfecting the teaching of labor relations law. (Address: *Illinois Law Review*, Northwestern University Press, 357 East Chicago Avenue, Chicago, Ill.; price for a single copy: \$1.00).

MILITARY JUSTICE — "*Revision of the Military Justice Process as Proposed by the War Department*": In the May issue of the *Virginia Law Review* (Vol. 33—No. 3; pages 269-288), Kenneth C. Royall, of the North Carolina Bar, Under Secretary of War, reviews the legislative proposals sponsored by the War Department which are pending before the Congress to cure certain defects in the military justice system. Mr. Royall summarizes the background (in many instances by reference to the Report and Recommendations of the War Department's Advisory Committee on Military Justice nominated by our Association and approved by the Secretary of War, which were summarized and discussed in the January and April issues of the JOURNAL), of such proposed amendments to the Articles of War as those relating to the representation of the accused by competent counsel, the use of admissions

and confessions, the service of enlisted men on general and special courts, limitations on command authority, increased powers of law members of courts, equalization of sentences, the system of appellate review, clemency proceedings, and punishments and penalties. The experienced author points out several respects in which military justice affords equal or even greater safeguards to an accused than does the system prevailing in civilian Courts, and concludes with the opinion that military courts in the late war "were efficient and prompt in their action and that few if any innocent men were convicted and that few if any guilty men escaped." For reasons pointed out in the Report of the Advisory Committee, our Association is continuing its active support of such of its recommendations as were not approved by the War Department. (Address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for single copy: \$1.00).

PRICE DISCRIMINATION—*"The Tyranny of Labels—A Study of Functional Discounts under The Robinson-Patman Act":* A comprehensive examination of "the extent to which, and the circumstances under which, so-called functional groups may be given special price consideration by a seller" is in the April issue of the *Harvard Law Review* (Vol. 60—No. 4; pages 571-604) under the above-quoted title. Harry L. Shniderman, of the District of Columbia Bar, attacks under six headings the "easy assumption that a functional class—wholesalers, fabricators, primary distributors—may receive special or discriminatory price treatment because of an historical practice of the trade, or because of the magic of the functional label". His six divisions are: (1) Marketing background of functional classifications and discounts; (2) The status of functional discounts prior to 1936 under Section 2 of the Clayton Act;

(3) Legislative history of The Robinson-Patman Act significant to the status of functional discounts; (4) The law of functional discounts under FTC decisions; (5) Some practical problems in devising a legal customer-classification system; and (6) Substantiality of the competitive effect of a price discrimination. Admitting that there is no simple answer to the complex problem of functional discounts under the Act, the author has contributed a most useful resumé of the relevant FTC proceedings and Court decisions. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: 75 cents).

TAXATION—Federal Income Taxes—Tax Avoidance by Family Partnerships and Corporations: Unless and until the Congress adopts something in the nature of the much discussed Surrey Plan permitting the effective division of incomes between husband and wife, many taxpayers in the higher brackets will continue to struggle to achieve the result by other means. One of the most favored devices is an attempt by the unfortunate possessor of a substantial income to enter into partnership arrangements, real or simulated, with other members of his family. Increasing interest in this means of avoiding the confiscatory impact of the high tax rates is confirmed by the increasing volume of discussions of the device.

In the April issue of the *Rocky Mountain Law Review* (Vol. 19—No. 3; pages 209-222), Charles E. Works, of the Denver Bar, writes of the "Taxation of Family Partnerships and Family Corporations". He concludes, as we read it, that the problems are primarily for legislative solution; and he cautions the attorney advising his client in such matters to proceed with considerable care, pointing out that illegitimate tax-saving schemes have become so widespread that the Internal Revenue Bureau now looks at even a proper

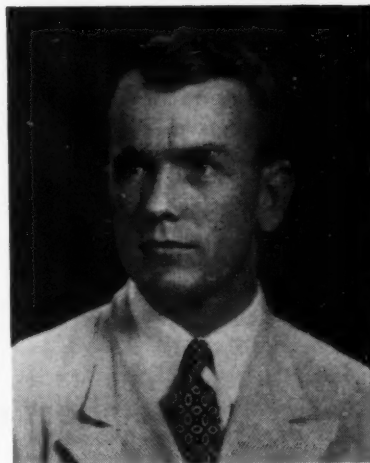
family arrangement with a great deal of suspicion. (Address: Rocky Mountain Law Review, University of Colorado, Boulder, Colo.; price for a single copy: \$1.00).

In the May issue of the *Georgia Bar Journal* (Vol. IX—No. 4; pages 353-367) Elbert P. Tuttle, of the Georgia Bar, and James H. Wilson, formerly President of the *Harvard Law Review*, have contributed a discussion of "The Confusion on Family Partnerships". This article is more critical than that by Mr. Works. The authors assert that the Tax Court of the United States has, by a misconstruction of the *Tower* case broadened the classification of the situations in which the Court will not permit a division of partnership income between husband and wife, to a point where it improperly includes situations in which a valid contribution to capital has been made. The authors discuss also the liability of the donee partners as transferees and the estate and gift tax consequences of the creation of family partnerships. (Address: Georgia Bar Journal, Persons Building, Macon, Ga.; price for a single copy: 50 cents).

TAXATION—State Taxes—"More About Gross Receipts Taxes": Professor Thomas Reed Powell's choice of title for his current analysis of Supreme Court decisions on gross receipts taxes suggests that during thirty years of writing authoritatively on the subject in the *Harvard Law Review*, he has acquired some patience with the successive phases of the constitutional interpretation of extra-State taxation. His article in the April issue (Vol. LX—No. 4; pages 501-538) is vigorously critical of the judicial reasoning which has produced the present confused state of the law on State taxation of inter-State business. (Address: Harvard Law Review, Gannett House, Cambridge Mass.; price for a single copy: 85 cents).

Our Younger Lawyers

by William R. Eddleman • Secretary, Junior Bar Conference



RANDOLPH W. THROWER

■ What the public thinks of lawyers and judges is a subject which has long concerned the Bar. Statistics indicate that very many of the American people secure their first impressions of our legal system in Traffic Courts and Justice of the Peace Courts.

The sessions recently concluded at New York University and the courses being offered in the Fall by Northwestern University, for the education of Traffic Court judges, officers and prosecutors, represent the culmination of joint activities of the Junior Bar Conference, the Section on Criminal Law, and the Special Committee on the Improvement of the Administration of Justice. Calvin M. Cory, of Las Vegas, Nevada, heads the Junior Bar's Traffic Court Committee. He was Clerk of the Senate Committee on the Judiciary during the time when the work of the American Bar Association in the field of administrative law was being carried forward, which culminated in the passage of the McCarran-Sumners Bill. James P. Economos, of Chicago, former Chairman of the Conference, acted as executive secretary of the Traffic Committee in developing the courses referred to. George Warren, of Trenton, New Jersey, whose book *Traffic Courts* is the landmark in this field, is serving as consultant to the Committee. Robert C. Bell, Jr., of Stamford, Connecticut, contributed to the development of the courses as the Council Adviser for this Committee.

The Committee to Aid the Small Litigant, headed by Randolph W. Thrower, of Atlanta, whose Council Adviser and former Chairman is K. Thomas Everngam, of Denton, Maryland, has arranged through collaboration with the Law School of the University of Michigan for Nation-

wide distribution of the Justice of Peace Survey conducted by Professor Edson R. Sunderland. The latter, in his exhaustive examination of the work of Justice of the Peace and other Courts of limited trial jurisdiction, was aided by a comprehensive survey on minor Courts, made by the Junior Bar Conference.

The Sunderland Report includes a draft of a model Act which gives an adequate answer to many of the practical questions raised by Bar Associations which seek to improve the administration of justice in the Courts of limited trial jurisdiction. This report is being widely distributed among the Bar. The Committee to Aid the Small Litigant is encouraging studies of the Justice of the Peace System by State Bars and is recommending the use of the Sunderland Report as a guide. Anyone who is interested and has not received a copy of this report may obtain one by writing the Conference Secretary, William R. Eddleman, 1411 Fourth Avenue Building, Seattle 1, Washington.

Continued demand has required further publication of the Alabama Small Loan Survey, prepared by Lawrence Dumas, of Montgomery, Alabama. The Georgia survey is being completed under the direction of Albert W. Stubbs, Jr., Murrah Building, Columbus, Georgia, and distribution will be made among members of the Bar, the press, and State and federal officials.

The younger lawyers have become true realists with respect to the Nation-wide problems of the administration of the Junior Bar Conference, believed to be the largest Section of our Association. Almost the whole time of the National officers, for the first three months after their election, is consumed each year with prob-

lems of organization. This takes valuable time which could be used for the accomplishment of the various programs of the Conference. This problem was assigned for study to a committee headed by former Conference Chairman, Lyman M. Tondel, Jr., of New York City.

After studying the experience of the thirteen years of Conference history and considering the discussions in the Council on the subject, the Committee submitted a recommendation for "streamlining" the Conference organization by retaining the present system of electing officers and at the same time providing that the new officers shall not assume their official duties until the January first following their election. This would make available to them a period of substantially three months within which to appoint and prepare the new officials and committees of the Conference for full-scale activity during the ensuing calendar year. A By-law to this effect was unanimously adopted by the Council as a solution of this problem. It was submitted to the Board of Governors at their June meeting and referred to its Subcommittee on Sections as a particular assignment of Harold H. Bredell, of Indianapolis. The Board of Gover-

nors will consider and report its recommendation as to whether or not the Conference shall be permitted to depart from the standard practice whereby Section officers start their terms with the adjournment of the Annual Meeting. The Conference proposes, subject to the approval of the Board of Governors and the adoption of the By-law

by the House of Delegates, to have the present officers and committees in any event continue their activities to the end of the calendar year 1947.

Rev. Joseph T. Tinnelly, of St. John's University, Brooklyn, New York, who is the industrious head of our Committee on Relations with Law Students, has seen to it this year that full information with respect

to our Association, its activities, achievements, and program, was made available to the many graduating students in law who are about to be admitted to the Bar. It is deeply regretted that, due to his duties with the Law School, Father Tinnelly has felt obliged to advise that he will be unable to continue this activity during the coming year.

Notice to Members of Junior Bar Conference

Notice is hereby given that at the annual meeting of the Junior Bar Conference to be held in Cleveland, Ohio, September 21, 22, 23, 1947, there will be elected a chairman, vice chairman, and secretary, each for a term of one year, a member of the Executive Council from each of the Judicial Circuits, First, Third, Fifth, Seventh and Ninth Federal and the District of Columbia, each for a term of two years.

■ Pursuant to Section 4 (B) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition shall state briefly a biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, James D. Fellers, Apco Tower, Oklahoma City 2, Oklahoma, not later than September 6, 1947. At the first session of the annual meeting the chairman of the Conference shall deliver to the chair-

man of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place, and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1948, or until their successors shall be elected and qualify, and the term of office of the Council members from the First, Third, Fifth, Seventh and Ninth

Federal and the District of Columbia Judicial Circuits shall begin with the adjournment of the 1947 annual meeting and end with the adjournment of the annual meeting to be held in 1949 or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer, or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three consecutive years or more.

WILLIAM R. EDDLEMAN, *Secretary
Junior Bar Conference
of the American Bar Association.*

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Mark H. Johnson, Committee Chairman.

Council Meeting

■ A meeting of the Council and committee chairmen of the Tax Section was held at the Mayflower Hotel, Washington, on June 7 and 8. All of the committee chairmen presented preliminary reports for consideration by the Council. Final reports are to be transmitted to the chairman of the Section by July 4, so that they may be circularized among the Section membership before the Cleveland meeting of the Association in September.

The following are some of the highlights of the meeting. (NOTE: A mimeographed bulletin summarizing the meeting is being mailed to all members of the Tax Section. Additional copies may be obtained by writing to William A. Sutherland, Chairman of the Tax Section, 1631 K St., N.W., Washington 6, D.C.)

Federal Income Taxes

A meeting of this committee was held on June 3 in New York City. James S. Y. Ivins, the chairman, reported that the committee was recommending action on a variety of subjects, and that several other important subjects were still under consideration. Among the items of widest general interest are: (1) limitation of grantor's tax under § 167 (c) to trust income actually used for the payment of insurance premiums; (2) refunds of taxes actually paid by servicemen who died while in active service; (3) simplification of income tax upon trust and beneficiary under § 162; (4) extension of reorganization definition to permit acquisition of assets by a subsidiary; (5) endowment policy proceeds as capital gain; (6) use of mod-

ern mortality tables for valuation; (7) unpaid compensation and interest under § 24 (c); (8) involuntary conversions of mortgaged property; (9) employee's stock option income under the Smith case; (10) taxation of annuity income; (11) business purpose test in recapitalizations; and (12) war loss recoveries.

Federal Estate and Gift Taxes

Paul E. Farrier reported that his committee is considering: (1) an estate tax deduction for expenses attributable to taxable property but paid out of the non-probate estate; (2) revision of the annuity tables; and (3) revision of the present statutory provisions for treatment of previously taxed property. He reported that Congressional action on the power of appointment problem has been postponed for the general Code revision in 1948. Meanwhile, it is expected that the time for release of powers will be extended until July 1, 1948.

Partnerships

Mark H. Johnson stated that the Committee on Taxation of Partnerships would recommend a "family partnership" statute which would retroactively overrule the *Tower* case as presently interpreted by the Tax Court. The purpose of the amendment is to restate the principle that income attributable to capital is taxable to the owner of the capital, whether that capital was acquired by gift or otherwise. The amendment would not, however, attempt to validate sham partnerships, nor would it permit deflection of income attributable to personal services rendered by one of the partners.

Excess Profits Tax

E. Chas. Eichenbaum reported that his committee had held two eventful meetings in Washington, the first in April, and the second on the day before the Council meeting. Seven subcommittees are now attempting to draft a variety of amendments which were discussed at these meetings.

Pension and Profit Sharing Trusts

John W. Drye, Jr. stated that he had considered several proposals to allow deductions for pension contributions on behalf of partners. He believed, however, that this was a policy matter which could be determined only as part of a program which would permit voluntary retirement plans on behalf of all self-employed persons. Moreover, it was believed that few law partners would derive any substantial benefits from pension plans if they were subjected to the same "discrimination" tests as are now applicable to corporations. The Council unanimously approved Mr. Drye's position.

Federal Judicial and Administrative Procedure

H. C. Kilpatrick reported that he expects early Congressional reversal of the "Dobson rule", in accordance with the amendment sponsored last year by his committee.

Bureau Practice and Procedure

Robert Ash discussed several important problems which his committee has under consideration, including (1) development of procedure whereby the taxpayer would have the opportunity of a conference with the official who actually decides his case; (2) improvement of procedure in fraud cases, with some possibility of conference where indictment is contemplated; (3) expediting Bureau rulings; and (4) granting greater authority to the Chief Counsel's office to settle pending Tax Court cases.

Tax Court Procedure

Hugh C. Bickford stated that his committee was working on a program

to simplify and expedite Tax Court procedure. This program includes: (1) requiring the Commissioner to state "grounds and issues" in the deficiency notice; (2) permitting notice and demand for the admission of facts; and (3) setting up an effective pre-trial procedure.

State and Local Taxes

Richard C. Beckett, chairman, and George D. Brabson, vice chairman, discussed their proposed program for this new committee. Mr. Beckett reported great interest among the large membership, and proposed that the committee be given eight hours at the Cleveland meeting to hold its own sessions at which speakers would pre-

sent papers on selected subjects. He reported that the subject of ad valorem property taxes appeared to be of widest general interest, and that lively interest has been evidenced also in the subjects of sales and use taxes, gasoline taxes, motor vehicle license fees, and state and local income taxes.

Interstate Aspects of State and Local Taxes

William C. Warren stated that his committee was studying the interstate commerce problem, with the possibility of recommending a federal statute whereby the federal government would preempt the interstate commerce field in order to de-

fine the principles for allocation of tax among the local taxing authorities.

Old Age Benefit and Unemployment Insurance Taxes

Bryan C. S. Elliott reported that it was difficult to generate enough interest in this subject among the Section membership to warrant a program. He proposed, however, that his committee attempt to cooperate with other interested committees of the Association to sponsor a luncheon and afternoon meeting at Cleveland, to be addressed by outstanding authorities on the subject. This proposal was endorsed by the Council.

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Movies, Press and Radio

(Continued from page 653)

#11575 (January 17, 1946):

"Don's question, '... what do you think of circumstantial evidence now?', might very probably invite severe legal criticism, if it comes through that this picture is a thesis against circumstantial evidence in all cases. May we suggest that you revise this question in such a way as to avoid any implication of this sort."

#11575 (January 24, 1946):

"In order to get away from the idea that Don is condemning all circumstantial evidence we must ask that somewhere in this scene Don explains that he is out to prove that in this one case the circumstantial evidence is wrong. This is important."

#11582 (January 26, 1946):

"It was agreed that the Judge would be played with proper decorum in this Courtroom scene..."

#11492 (January 31, 1946):

"May we again suggest the advisability of securing proper technical advice as to the Courtroom scenes and, specifically, as to the scenes in which the judge pronounces

sentence."

#11582 (February 1, 1946):

"It does not seem to us that the judge's speech in scene 236 is sufficiently corrected. Since we desire to make certain that he, as the presiding official, is the representative of order and decorum in this Courtroom scene, we request that his blunders about 'the face' and 'Mrs. Face' be eliminated." (Note: The final characterization of the judge was "straight" and sympathetic, not comic as appeared probable before these advisory opinions were given.)

#11554 (March 1, 1946):

"Page 22: We suggest omitting any actual scenes of undignified reaction on the part of the judge to Steve flourishing the gun."

#11890 (April 25, 1946):

"It was suggested that instead of using a defense attorney, they make him the prosecuting attorney, who would be in and out of the picture at stated intervals, affirmatively pointing up the wrongness of Larry's activities. This, we agreed, would be a 'step in the right direction', but still

not sufficient to meet the requirements of the Code."

#11989 (May 14, 1946):

"Craig's line, 'Not if I have to frame you into jail', seems questionable, coming from the District Attorney, and we suggest that you change the underscored word to 'throw'."

"We suggest that you omit the words 'maybe illegal', as questionable coming from the District Attorney."

#11890 (May 28, 1946):

"Page 4: Cahill's opening statement to the jury must be delivered straight and convincingly. This is most important."

"Page 32: As we read the description of the members of the jury, here and elsewhere, where they are shown in close-up, they seem to be little more than caricatures. Any such suggestion, in a story of this kind, would be completely unacceptable. They should be portrayed as average, dignified, responsible members of the community, and not as 'so many wax-

work dummies'—fanatics, granite-faced widows, etc., etc. This is essential."

VII—CONCLUSION

If it is borne in mind, as stated earlier, that an unavoidable element in dramatic presentation is some conflict or struggle, and furthermore the processes of law inevitably appear in such entertainment, then it follows that in the modern motion picture there not only are, but should be, legal situations and personalities involved with and center-

ing on these facts. Judges, district attorneys, lawyers, sheriffs, policemen, and all the other callings incidental to the administration of both simple and advanced legal systems will be found, and should be found, in modern films.

It would be unfair and properly objectionable if an exaggerated treatment or distorted misrepresentation of such persons were to form a bad over-all and generalized opinion in the minds of the theatre-going public. Whether or not such a misrepresentation is a fact, is a matter not

of vague impression or hearsay, but of evidence. It was the purpose of this study to collect the evidence and then draw a reasonable conclusion therefrom. That conclusion is that judges, district attorneys, lawyers, and Courtroom scenes have not been handled unfairly or unjustly. Both the spirit and the letter of the Production Code have been and continue to be well served. The legal profession and the processes of law need not fear and have not been given unfair treatment by the producers of American motion pictures.

Trial of Agency Cases

(Continued from page 658)

The essence of success in government regulation, or of any law enforcement, is public approval of the conduct of the administrator. You cannot hire enough agents to enforce a law in this country, if the public does not approve that enforcement. By approval I mean fundamental approval, not spasmodic or vociferous acclamation. If the public does not approve, witnesses will not cooperate, juries will not convict, observers will not report violations, and every Tom, Dick and Harry will make a point of ignoring the law or regulation just for the principle of the thing. And finally Congress gets around to it. Therefore, wise regulation is based upon the simple conduct of cold-blooded objectivity which creates a public confidence and approval, an unshakable rock upon which to stand. In and of itself, that approval results in law observance.

I urge upon you the vital necessity of a rigid compliance by all administrative agencies of the simple and easy fundamentals of what the American people consider the proper administration of law.

The Public Distrusts Aversion to Judicial Review

The third problem which I should like to state is the necessity for a proper coordination between the ad-

ministrative and judicial functions in these matters. I do not speak in favor of greater judicial review. Neither do I speak from the standpoint of the Courts. I do not think that the Courts want to venture farther than necessary into the technical and complicated questions which arise in the administrative field. I speak from the standpoint of the agencies. The fact is that the public distrusts any officer or agent who does not want his action to be subjected to scrutiny.

I do not think it an accident that the most reviewed of all administrative agencies, the Bureau of Internal Revenue, which deals with the most universally unpopular of all subjects—taxes—has a place of unshakable stability in public estimation and support, whereas agencies with more popular functions but which successfully prevented provisions for review, have been shattered by storms.

There is a public confidence in the mere fact of the possibility of review. Wisdom on the part of the agencies would dictate an insistence by them upon the easy availability of judicial review to the extent necessary to prevent the possibility of arbitrary or unjust action. An insurance for the people against arbitrary action by the agencies is at the same time insurance for the agencies against arbitrary action by the people. Of course, the problem has been largely settled

by the Administrative Procedure Act. My proposition is that we ought to lay the debate to rest, for the greater benefit of the agencies and the practitioners before them.

Two Methods of Solving the Mutual Problems

And now where does all this leave us? There are two methods of solving mutual problems upon which there are conflicting views. The first we might call the antipathy method, or the ordeal by contest. Mostly we have been following that method. On the one hand the Bar has been crying aloud that the agencies want to set up administrative absolutism and to destroy our system of government, to obliterate the rule of law. I have known a lot of administrators. One day Joe Doaks is practicing law like the rest of us. The next day he is Mr. Commissioner or Mr. General Counsel. And the next day he is Joe Doaks again. He doesn't change so very much in the process. One day he is whooping it up for his client—a bricklayer, or a merchant, or a broadcasting company. The next day he is whooping it up for his client, the Secretary of Agriculture or John Q. Public. Of course, there are some crackpots in the agencies, about the same proportion as there are at the Bar, I think, or in any healthy community. And there are some radicals

who would like to tear down the whole structure, but again I think the proportion in the agencies is about the same as that among members of the Bar or in a normal community.

But neither the crackpots nor the radicals are long-time major problems. Mostly the real trouble is twofold. One is an excess of zealotry. It is a normal human characteristic. You never saw an expert on tuberculosis who didn't think everybody had tuberculosis, or at least ought to be x-rayed for it; or a vegetarian who didn't think eating meat was a terrible evil. Specialists have enormous ideas on their respective subjects. The other trouble is that an expert knows he knows more about his subject than does anybody else. If left entirely alone, without supervision, he could handle that field to exquisite perfection. And maybe he could.

At any rate, much of the Bar is disturbed and curses roundly at the agencies which contest any semblance of a check on their activities.

Antipathy and Contest Bring No Solutions

On the other hand, some agencies are vociferous in proclaiming that the Bar is unprincipled, and selfish to boot, and wants to interfere with the efficiency of administrative action, to block dire unpleasantness to their clients. To tell the truth, there is much basis for the charge. But it is not the utter truth. The Bar is conservative. It is the most jealous of all groups in protection of those rights spelled out over the centuries in the people's struggle against governmental tyranny. But mostly the trouble is that the lawyers seldom get together on a non-client basis and approach a problem in the detached viewpoint of which they are capable.

On the whole, the solution of mutual problems by noncooperative antipathy gets exactly nowhere.

Bar Association Cooperation Offers a Means of Improvement

The other method we might call the cooperative approach. It has been

tried with tremendous success in other fields of the administration of justice. Every federal circuit now has an annual Conference of judges and lawyers for the discussion of mutual problems. There is a committee in every State, sponsored by the American Bar Association, for the improvement of the administration of justice, and composed of judges and lawyers. Chief Justice Laws is chairman of that Committee in the District of Columbia, and he has recently added laymen to the group. I well remember the pleasure everyone involved received from mutual conferences on procedure between the Bureau of Internal Revenue and the American Bar Committee on Taxation. I also remember what mutual benefit followed when our local Public Utilities Commission called in representatives of the local Bar to assist in the preparation of rules for its procedure. I believe that the Interstate Commerce Commission did the same thing. The new Federal Rules of Civil and Criminal Procedure were drafted largely by practitioners at the Bar.

The Conference Method Could Overcome Obstacles

What have we here? On the one side, all, or almost all, the federal administrative agencies are here in Washington. On the other hand, in this Association are practitioners who are specialists in practice before every agency. All these people live here. They do not have to be assembled from vast distances or confer by correspondence.

What could they do? I am not going to suggest. If enough of you are interested in the matter to take it up, you will think of plenty of things. If you are not interested, nothing will be done anyhow. But I don't mind supposing a little.

Suppose, first of all, that we could coordinate the thought and experience of all the agencies, and of all the various sorts of specialty practitioners, not with the idea of producing a uniform system of procedure necessarily, but with the idea of improving the procedure of each by

composite suggestions of all.

Suppose a Joint Conference were arranged as an annual event, composed of representatives of all the agencies or such of them as wanted to join in and the Bar invited to participate, as the Judicial Conferences do?

Or suppose a Joint Committee were established, composed of fifteen or twenty of the general counsel of the agencies and their representatives, and the same number of practitioners, the function of the Committee being to formulate recommendations for the improvement of administrative procedure? Or suppose the American Bar Association put its weight behind such a program and sponsored such a Committee?

Or suppose this Section prepared and published a book or series of pamphlets, done with great care, and the cooperation of invited participants from the agencies, on the practical features of administrative procedure and its peculiarities? "How to prepare an administrative case for trial", "How to ask questions on direct", "When and how to cross-examine", "How to get a document into a record", "How to handle statistical information", and so on.

Or suppose this Section instituted a seminar to be held every year with experienced practitioners to lecture on and demonstrate the purely practical side of procedure?

Is all this too ambitious a program? Maybe so, but these are big issues and this is an able body of men.

In closing his talk, Judge Prettyman made several "affirmative suggestions", as to what could be done to "coordinate the thought and experience of all the agencies, and of all the various sorts of specialty practitioners, not with the idea of producing a uniform system of procedure necessarily, but with the idea of improving the procedure of each by composite suggestions of all." To that end, he "supposed" as possible and practicable steps some or all of the following:

1. That a Joint Conference be "arranged as an annual event, composed of representatives of all the agencies, or such of them as wanted to join in, and a selected group of delegates from this Section, for the joint consideration of problems in administrative procedure".

2. That the Attorney General "institute such an Administrative Conference and invite the Bar to participate, as the Judicial Conferences do".

3. That a Joint Committee be "established, composed of fifteen or twenty of the general counsel of the agencies and their representatives, and the same number of practitioners, the function of the Committee being to formulate recommendations for the improvement of

administrative procedure."

4. That Attorney General Clark "institute as a permanent organization an Attorney General's Committee on the Improvement of Administrative Procedure."

5. That "the American Bar Association put its weight behind such a program and sponsor a committee to be operated by this Section or in cooperation with this Section."

In conclusion Judge Prettyman said:

"How would such efforts be started? I suppose by the appointment of a Committee of this Section to wait on the Attorney General and the several agencies, or upon the heads of the American Bar Association.

"Or suppose this Section prepared

and published a book or series of pamphlets, done with great care, and the cooperation of invited participants from the agencies, on the practical features of administrative procedure and its peculiarities: 'How to prepare an administrative case for trial', 'How to ask questions on direct', 'When and how to cross-examine', 'How to get a document into a record', 'How to handle statistical information', and so on. Or suppose this Section instituted a seminar to be held every year with experienced practitioners to lecture on and demonstrate the purely practical side of procedure?

"Is all this too ambitious a program? Maybe so, but these are big issues and this is an able body of men."

The Army Makes It "Official"

■ The War Department issued on June 18, to all officers and enlisted men in its forces at home and abroad a pamphlet which says outspokenly and officially many of the things which the JOURNAL and other exponents of American public opinion have been trying to bring home to our leaders and people for many months.

"Communists here and everywhere", the Army warning to its troops declares, "support the Soviet Union, and not the United States.

"The Communists hate our American Army in particular. The presence of one million trained men who have pledged their lives to defend the Constitution of the United States against all enemies, whomsoever, is a strong barrier against their aims to take over the Government.

"Communists, both in and out of the Army, conducted themselves in a manner that was near mutiny in agitating the return of American troops from abroad," the War Department now says as to the events which followed VJ-day. "Their purpose was obvious. They wanted to reduce American military strength in occupied areas to give Communism a fertile field in which to carry on work."

The pamphlet gives directions as to how to detect the agents of Russia who wear American uniforms or are encountered as civilians in the United States or overseas.

"If a person always supports the party line, agrees with the party press, always supports policies of the Soviet Union, he is Communist," the War Department gives as its test,

"Communism is the opposite of democracy. Its backers seek the downfall of the American system of government."

American troops also are cautioned in the pamphlet that Communists have infiltrated into positions in the American Government, and that they have been "particularly effective at boring from within in labor unions here."

The War Department's pamphlet adds that "the Army does not wish to begin a Communist witch hunt today, in deference to the genuine liberals, who must not be confused with these enemies of the United States." On the cover of the document the Statue of Liberty is depicted with a heavy shadow cast by a hammer and sickle over the American symbol of liberty enlightening the world.

(Continued from page 670)

**Parson Fined
for Criticising Justice Hutton for
His Decision in the Famous Ship-
money Case**

(14 Charles I, 1639)

"That 28, Aprilis, 14 Car. Justice Hutton argued in the Exchequer Chamber in the Case adjourned thither, upon a Scire facias by the King against Hampden for Ship-money, in which he was of opinion, that as well for the matter as for the form, upon divers exceptions to the pleading, Judgment should be given against the King.

"Afterwards, viz. 4. Maij, Thomas Harrison Batchelor of Divinity, and Parson of Creak in Northamp, came to the Court of Common Bench (Justice Hutton, and Justice Crawley then being there giving Rules and Divers) and said, I accuse Mr. Justice Hutton of high Treason, for which he was committed to the custody of the Warden of the Fleet by Justice Crawley; and after by the direction of the King, he was indicted in the Kings Bench, and convicted and fined to five thousand pounds to the King: And Justice Hutton preferred his Bill against him there, and recovered ten thousand pound Damages."

Three Precedents from Aleyn's Reports
Aleyn's Reports (about 100 cases) cover cases during the latter part of the reign of Charles I. Three cases are presented:

Effect of Rats Gnawing a Will
(22 Charles I, 1647)

"Upon a tryal at the Bar the Evidence was that one Warner by his Will in writing devised the Lands in question to Henry Etheringham, and the Heirs male of his body, and bailed the Writing to the Scrivener to keep, and four years after died, and about a fortnight after his death this Writing was found in the Scrivener's Study, gnawn all to pieces with Rats, yet he with the help of the pieces, and of his memory and other Witnesses, caused it to be proved in the Ecclesiastical Court; and now the Court demanded of the Witnesses, whether a Stranger that knew not the

Contents of the Will before, by joyning of the pieces together could tell that the devise of the Lands in question was to Etheringham, and the Heirs male of his body; for they did agree that if this clause could be made out, though by joyning of the pieces, it were a good Will, for all that. But the Witnesses said that a Stranger could not make out that clause. Whereupon the Court directed the Jury, that if they found that the Will was gnawn before the death of the Devisor, then 'twas for the Plaintiff; if after, for the Defendant; and the Jury found for the Defendant in favour of the Will."

Indictment of Sir John Chichester
(22 Charles I, 1647)

"Sir J. C. was indicted of Manslaughter, and tried at the Bar, and evidence was that he and his Man were playing at foils, and the Chafe of Sir John's Scabbard fell off unknown to him upon a thrust, so that the Rapier went into his man's Belly, and killed him. And the Court directed the Jury, that forasmuch as such acts are not warranted by Law, the parties that use them ought at their own peril to prevent the mischief that may ensue, for consent will not change the Case; and therefore though there were no intention of doing mischief, yet the thrust being voluntary, was an assault in Law, and death ensuing, the offence was Manslaughter."

A Case of Slander
(23 Charles I, 1648)

"Thou art a Thief, and hast stolen my Dung: After a Verdict for the Plaintiff it was moved, that the words were not actionable, because Dung is an indifferent word to signify either Dung in a heap, which is a Chattel, or Dung spread or scattered upon the ground, which is parcel of the freehold, and then no felony may be committed of it. But upon good debate Judgment was given for the Plaintiff, because the first words being plainly actionable, the effect of them shall not be taken away by subsequent words ambiguous; for when subsequent words should qualifie the words precedent,

they ought to carry in them a strong intendment, that they were spoken in such a sense as was not actionable; and then also Roll held they ought to be brought in by way of explanation by the word For, as to say thou art a Thief, for thou hast, etc. but if the words are, thou art a Thief, and hast stoln, etc. there the latter words are cumulative. But Bacon denied the difference, and cited Clerk and Gilbert's Case, Hob. 331. where that difference is denied, and said, that 8. Car. in the Common Pleas, where the words were thou art a Thief, and hast robb'd thy Kinsman of his Land, The Court was divided in opinion; but after upon Conference with all the Justices at Serjeants Inn, it was adjudged for the Plaintiff."

**The Quaint Preface
to Style's Reports**

Style's Reports (about 750 cases, 1646 to 1655) also contains a quaint preface entitled "The Epistle Dedicatory" followed by a long address "To the Industrious, and Ingenuous Professors, and Students of the Common Laws of England; but more particularly, and affectionately to the Associates of the honourable Society of the Inner Temple."

At page 261 there is a MEMORANDUM—Stating the case of *White vs. Keblewhite* (1651) as being the case in which the first rule of court was made in English.

At page 413 in *Hacker vs. Newborn* (1653)—Roll, chief justice ruled that proceedings in a new action be staid until the costs in the former action are paid. This is a salutary rule not enforced in all States even at the present time.

In 1654 Roll, chief justice held that a Will may be revoked by parol. This was before the Statute dealing with wills, passed as a part of the Statute of Frauds and Perjuries during the reign of Charles II, which statute has been adopted in nearly all the States of the Union.

In *Waldron vs. Ward* (1654) it was held that a Counsellor at the Bar cannot be examined as a witness regarding confidences with his client.

Preface and Cases from Kelyng's Reports

Kelyng's Reports published in 1708 are entitled "Of Divers Cases in Pleas of the Crown. Adjudged and Determined, in the Reign of the late King Charles II. With Directions for Justices of the Peace and Others". Again the preface is interesting:

Reader. There can be nothing more said to recommend these Cases to your Perusal, than to assure you they are the Collection of Sir John Kelyng, Kt. sometime Chief Justice of the Court of King's Bench; The Manuscript whereof under his own Hand was in the Custody of his Grandson and Heir; Copies whereof were Dispersed in several Hands, which might hereafter be Published to the Injury of the Author, and disadvantage of the Publick. There are Two Quaeres inserted in the Margent by the Publisher; The one is Page 13, the other is Page 41, which may be fit to be considered by the Learned.

The Three Modern Cases are conceived to be of some use, therefore are thought fit to be Published; And if they shall be found to be of any Benefit, its what is desired by the Publisher thereof. Farewel.

Turner's Case
(16 Charles II, 1676)

This case lays down the rule that one may not be put twice in jeopardy for the same offense:

"At the same Sessions there was this Question, One James Turner and William Turner, at Christmas Sessions last, were indicted, of Burglary for breaking the House of Mr. Tryon in the Night, and taking away great Sums of Mony; and thereupon James Turner was found Guilty and executed; but William Turner was then acquitted. And now there being great Evidence that William Turner was in the same Burglary with James Turner, and there being 47 l. of the Mony of one Hill, a Servant to Mr. Tryon, Stolen at the same time which 47 l. was not in the former indictment, they would have indicted William Turner again now for Burglary, for breaking the House of Mr. Tryon, and taking thence 47 l. of the Mony of Hills; but we all agreed that William Turner being formerly indicted for Burglary in breaking the House of Mr. Tryon, and stealing his Goods, and acquit-

ted, he cannot now be indicted again for the same Burglary for breaking the House; but we all agreed, he might be indicted for Felony, for stealing the Mony of Hill. For they are several felonies, and he was not indicted of this felony before, and so he was indicted. And afterwards I told my Lord Chief Justice Bridgeman what we had done, and he agreed the Law to be so as we had directed."

Mr. Ford's Case
(18 Charles II, 1678)

"My Brother Archer, upon Discourse, told me he well remembered the Case of Mr. Ford a Gent. in Grays Inn, who in the time when Sir Nich. Hyde was Chief Justice, was indicted of Murder in the King's Bench, and upon the Evidence, the case was that Mr. Ford with other Company, was in the Vine Tavern in Holborn, in a Room; and some other Company, bringing with them some Women of ill Fame, would needs have the Room where Mr. Ford was, and turn him out, to which Mr. Ford answered, that if they had civilly desired it, they might have had it, but he would not be turned out by force; and thereupon they drew their Swords on Mr. Ford, and his Company, and Mr. Ford drew his Sword, kill'd one of them, and it was adjudged justifiable."

Shower's Cases in Parliament (1698)
Shower's Cases in Parliament (House of Lords) "Resolved and Adjudged, upon Petitions, and Writs of Error" published 1698. The Preface is interesting. It begins:

To the Reader. No Collection of Cases adjudged in Parliament having been yet published, a Preface seems necessary to bespeak the Reception of that which is now presented to the World.

To commend or excuse the Collector, will not perhaps be a method to introduce it most to advantage: what may be spoken in favour of his diligence or capacity, will be censured vain, and if any excuse be offered for his inability to have done it better, some will be ready to take him at his word, and think the Performance comes from a careless or unskilful Hand.

There is an interesting note fol-

lowing the preface announcing that an edition of Diodorus is about to be published:

There will shortly be Printed, The Historical Library of Diodorus the Sicilian, the whole Fifteen Books, Translated from the Greek, with all the Fragments; And will be Sold by Awnsham and John Churchill in Paternoster-row.

Most of the cases reported are too long to be quoted but at page 18 is an interesting case of the development of the law of general and special average covering losses at sea. The case lays down the doctrine almost as it has continued to the present day.

Modern Cases As Reported in 1719

Modern Cases published in 1719 cover cases during the reign of Queen Anne. These volumes contain many interesting decisions:

Mayor of Winchester vs. Wilks (2 Anne, 1704) confirms the right of cities to establish customs for the carrying on of a trade.

Regina vs. Orbell (2 Anne, 1704) holds that one may be indicted for cheating in a foot race.

College of Physicians vs. Rose (2 Anne, 1704) holds action lies against an apothecary for the practice of physick; viz., prescribing medicine without being a licensed doctor.

Wigg vs. Rook (2 Anne, 1704) where a contempt order issued against an attorney for not appearing for a party after he had once appeared.

Regina vs. Cotesworth (3 Anne, 1705) held it a battery to spit in another's face.

Britton vs. Standish (3 Anne, 1705) involved prosecution for not attending church on Sunday.

Regina vs. Foxby (3 Anne, 1705) on an indictment for scolding, said:

Scolding by wives once or twice is no great matter, for scolding alone is not the offence, but frequent repetition.

Williams' Reports (1740)
Were Comprehensive

Peere Williams' Reports: These reports, appearing in several volumes, are the most comprehensive of the earlier reports and contain a very

large number of cases. They were collected by William Peere Williams, Gray's Inn, and are attested by various of the judges. They were first published in 1740, and cover cases decided from 1705 to 1727. The following are selected:

Brown vs. Litton (1711)

Where the captain of a ship dies leaving money on board and the mate becomes captain and improves the money, he shall, on allowance made him for his care in the management of such money, account for the profits and not for interest.

Ekins vs. East India Company (1717)

The plaintiff *Ekins* was possessed of a ship, and an agent of the East-India Company in the East Indies bought the ship and the cargo in her of the commander who had no power to sell. The ship and cargo having been wrongfully taken by the defendant and the taking having occurred in India, in recovery of the value of the ship and cargo the defendant was allowed interest at the Indian rate of 12% instead of the British rate.

Copeland vs. Stanton (1718)

"A Witness on the part of the defendant was sworn, and having appeared before the examiner, was examined to several interrogatories, after which he was appointed by the examiner to come another day, but the next morning was suddenly taken ill, and died." The court held where a witness dies after examination, but before such examination is signed by him, his deposition can not be made use of.

Devise of Colonel Coddington to Oxford (1719)

Colonel Coddington devised to All Souls College in Oxford in these words, "I devise my library of books now in the custody of Mr. Carswell, to All Souls College in Oxford," and in the same will he devised to the said college 4000 l. more to augment their library. After which the testator bought several books of value which were placed in the library. The court held that these after acquired books, placed in the same library, came

under the devise though they were not in the "library of books now in the custody of Mr. Carswell."

De Costa vs. Scandret (1723)

A merchant having doubtful account of his ship insured it without acquainting the insurers of the danger the ship was in. The court held this to be a fraudulent insurance and relieved against the policy.

Child vs. Hudson's Bay Company (1723)

The Hudson's Bay Company made a by-law that if any of their members should be indebted to the company, his stock in the company should be in the first place liable for the debts which such member owed the company and should be liable to answer the calls of the company upon the stock. The court held that the company under its charter had power to make such a by-law.

Dr. Martin and Lady Arabella Howard, his wife, against Nutkin, et al.

A bill was brought against the defendants, the church wardens, to stay the ringing of the five o'clock bell of the town of Hammersmith which usually had been rung at five o'clock in the morning. The plaintiff's house being so near the church that the five o'clock bell rung in the morning disturbed her, the plaintiff came to an agreement in writing with the church wardens and inhabitants at a vestry, that the plaintiff would erect a cupola and clock at the church, and in consideration thereof the five o'clock bell should not be rung in the morning. The court held this to be a good agreement and binding in equity.

The Preface of the Fortescue Reports (1748)

Fortescue's Reports published in 1748 by "John Lord Fortescue, Late one of the Justices of the Common Pleas." The Preface is quaint and informative. One interesting paragraph states:

In other Nations, every Lawyer's Opinion goes for Law, but it is not so with us; nor is our Law rack'd and tortur'd with such Voluminous Comments and Glosses, which make Disputes endless, and eat out the very

Heart of the Law. Our Judges do not determine (and that is our Happiness) as other Nations do, (where the Judges are absolute) who judge and determine according to their Princes, or their own, arbitrary Will and Pleasure; but ours determine and judge according to the settled and established Rules, and ancient Customs of the Nation, approv'd for many Successions of Ages.

Another paragraph pays Mr. Justice Fortescue's compliments to the Law French:

And here I cannot but observe, that while the Saxon is totally neglected, some not content to learn the Law French, for what is already wrote in it, seem fond of the Use of it, and of writing new Things in it; but for what Reason I am at a Loss: and at a greater yet, why any lawyer should write Reports in that Tongue. The best Law French is that which we find in the old Statutes and Year-Books, which is suppos'd to be that Tongue, which the French spoke about the Time of William the First, and sometime after: That is to say, it is the Speech which the French themselves have laid aside as impure for above Five hundred Years. So that the Law French is nothing but the barbarous unpolished Beginning or Chaos of the Modern French, and seems in my Opinion, to serve for little else but to cramp good Sense, and confine the best Reasoning, within the narrow Limits of a Tongue form'd in the Ignorance of Times. And can any Englishman, whose native Tongue far exceeds the French after all its Refinement, value himself upon writing in that which is the Refuse of the French Language?

Three cases are here taken from the *Fortescue Reports*:

Lord Mordington's Case

(8 George II)

"The Lord Mordington, who was a Scotch Peer, but not one of those who sat in Parliament, being arrested, moved the Court of Common Pleas to be discharged, as being intitled by the Act of Union to all the Privileges of a Peer of Great Britain, except a Seat in Parliament; and prayed an Attachment against the Bailiff; upon which a Rule was made to shew Cause.

"And thereupon the Bailiff made an Affidavit, that when he arrested the said Lord, he was so mean in his Apparel, as having a worn-out Suit of Cloaths, and a dirty Shirt on, and

but Sixpence in his Pocket, he could not suppose him to be a Peer of Great Britain; and therefore through inadvertency arrested him.

"The Court discharged the Lord, and made the Bailiff ask Pardon."

Habeas Corpus

(13 William III)

Whether the writ lies to bring a father into court to justify his alleged cruelty to his daughter. *Holt* held that the writ of Habeas Corpus was available even though the matter might have been corrected by guardianship proceedings, and the daughter was brought into Court under the writ but on examination disowned her father as unkind to her except that he some times gave her a "flip" with his glove.

King vs. The Mayor and Alderman

(9 George I)

"This was a Mandamus to restore one John Simpson to the Office of Capital Citizen of the City of Carlisle, and the Return made was, that he gave a Bribe of fifty Guineas, together with a Promise to his Son to get him an Exciseman's Place, if he would vote for one Patteson to be Mayor of that City." It was urged that the city could not remove an officer of the city for an alleged offense or bribery, "without any prior conviction at law." The court held that the corporation may remove an officer for an offense against his duty without any conviction at law.

The Significance of Blackstone's Commentaries

As heretofore indicated, these unofficial Reports, led by the great *Commentaries* of Plowden and Coke, extend practically from the cessation of the *Year Books* to the *Lectures and Writings* of Blackstone. They cover an exceedingly interesting and important period in English law and English history and present a succession of precedents that largely make up the great body of English Common Law.

With this more than a century and a half of miscellaneous, somewhat haphazard reporting of precedents, it is easy to see why, in the middle of the 18th century, there was great need of a Blackstone—someone to collect, clarify and classify the principles of law that the Courts had established and declared by 150 years of successive judicial decisions, and to set forth, intelligently and concisely, these principles of law for the benefit of Courts, lawyers and students of the law. Blackstone was not the *source*, in the sense of being the *originator*, of the legal principles of his *Commentaries*, but he was a classifier and an organizer, and clearly restated the principles announced by the succession of precedents that preceded his time.

This was the great service rendered by Blackstone. How well he rendered it is attested by the fact that in the Courts of England and America at the present day a quo-

tation from Blackstone, in support of a legal principle, carries very great weight. The Supreme Court of the United States and the lesser Courts of this Country frequently refer to Blackstone as the source and authority for their pronouncement of legal principles. It is common knowledge that all of our revolutionary lawyers and statesmen were readers of Blackstone; and many lawyers, from Patrick Henry to Abraham Lincoln and beyond, obtained most of their initial legal learning and preparation from a reading and study of Blackstone.

The present-day lawyer rather takes for granted our present all-inclusive official reporting of the decisions of Courts of record. If he thinks of the matter at all, he probably looks upon this reporting as something which had always existed as an essential element of the judicial system, as something inherent in the very system itself, without which the judicial system could not function. But, as we see, this present system of complete official reporting is in fact the result of a very long slow process of evolution, and even after the invention of printing the process developed very slowly.

At present the complaint is that there is a surfeit instead of a lack of official reporting of Court decisions; and doubtless the next trend or development will be in the direction of restricting or curtailing the present enormous output of reported Court decisions.

14

"Books for Lawyers"

(Continued from page 693)

where age held them back, they did not take kindly to desk jobs. The picture of what went on, in peacetime law practice and during the war years, is in this book. It will hardly be a "best seller", but our profession should be glad that it was written. Reading it is worth the time required. Oh, yes, the lawyer of the plot was "smooth" in Court, skillful in war work, but

harsh and strident when trying to pick wall-paper for his bedroom. "Justice" was a woman—the woman he should have married, but did not.

ROBINSON-PATMAN ACT SYMPOSIUM. *New York and Chicago: Commerce Clearing House, Inc. 1947. \$1.00 (heavy paper covers). Pages 112.*

The papers and ensuing discus-

sion in an open forum conducted by the Section on Food, Drug and Cosmetic Law of the New York State Bar Association, on the federal law against price discrimination (Section 2 of the Clayton Act as amended by the Robinson-Patman Act), have been brought together in a compact volume. In such a down-to-earth debate, as Mr. Justice Holmes once said, "a valid idea is worth a regiment."

ACADEMIC ADVENTURES. *A Law School Professor's Recollections and Observations.* By Charles P. Sherman. Cincinnati: The W. H. Anderson Company. 1947. \$5.00. Pages 314.

Those who disagree with Dr. Samuel Johnson's observation that "Every man's life may best be written by himself" will not change their mind by reading this autobiography, but they will find in it a lot of interesting *personalia* as to the profession of law and the teaching of law in New England. Born in West Springfield, Massachusetts, in 1874, being graduated from Yale College and Law School, Professor Sherman taught law at Yale, at Boston University, the Catholic University of America, and the National University. He was the founder and first faculty editor of the *Boston University Law Review*. He has been a member of our Association since 1912. After this autobiography, he will publish a life of Justinian.

During his "academic adventures", Professor Sherman was in many interesting episodes and conducted considerable correspondence, some of which he publishes. He gives thus his version of the "spontaneous movement" by which William Howard Taft became Dean of Law at Yale. His reminiscent chronicles are of great personalities—Judge Simeon E. Baldwin; Dr. Chung Hui Wang, one of the world's greatest juridical statesmen; William Graham Sumner; Dean Henry Wade Rogers, later a distinguished federal judge, and many others.

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THE PEOPLE LOOK AT RADIO. By Paul F. Lazarsfeld and Harry Field. Chapel Hill: University of North Carolina Press. 1946. \$2.50. Pages IX, 158.

This informative volume is now available. It embodies the results of an objective survey conducted by the National Opinion Research Center of the University of Denver (Harry Field, Director), analyzed and interpreted by the Bureau of Applied Social Research of Columbia University (Paul F. Lazarsfeld, Director). It is neither an attack nor a defense, but is factual, scientific in the statistical sense, and illuminating. The strength and weaknesses of radio as a public servant if kept free from governmental control and interference, are strikingly pointed out, from the tests of the public's reactions. We mention the volume here because those who read it will find that its contents have a vital bearing on the subject-matters discussed in the ground-breaking conference conducted by our Association on June 4, as reported elsewhere in this issue.

THE PORTAL-TO-PORTAL ACT OF 1947. Washington: Bureau of National Affairs. June, 1947. \$1.00. (Heavy paper covers). Pages 90, with extensive supplements and topical indices.

This handy volume which lawyers may currently need contains a special analytical report on the new Act—what it does, how it applies, what it means—with much of the legislative history and contemporary interpretations, including Committee re-

ports, significant excerpts from the debates, and the Conference report, as well as the full text of the Act. As a most desirable precedent, the page opposite the frontispiece contains, as to the purpose of the publication, a quotation from the Declaration of Principles jointly prepared and adopted by a Committee of our Association and a Committee of Publishers and Associations which concludes: "If legal advice or other expert assistance is required, the services of a competent professional person should be sought."

MONOPOLIES AND PATENTS. By Harold G. Fox, K. C. Toronto: The University of Toronto Press (Legal Series). 1947. \$10.00. Pages xxv, 388.

Mr. Fox is an experienced and scholarly Canadian lawyer who is also the principal executive of an important industry. He is also the lecturer in the Law of Industrial Property in the faculty of the School of Law, University of Toronto. His books and law review articles on patent, trade-mark and copyright law have been read extensively and to advantage, in the United States.

His present work is a painstaking study of the history and probable future of the patent system. It advocates a strong patent system efficiently administered, as a bulwark against collectivism. He does not regard the modern patent of invention as creating anything akin to monopoly, if correctly understood.

So he decries the witch-hunt against monopoly, especially when it is directed against the patent system. His

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views are not, however, merely static; he proposes an amendment of the patent system to eliminate the indefinable element of inventive ingenuity from the content of patentability. All in all, whether or not one agrees fully with the views expressed as to the nature and history of the patent system or with his proposal for a change in it, this will be recognized as a highly competent defense of the system, against the open and covert attacks being made on it in the United States, Canada and the United Kingdom.

PREVIEWS

BOOKS AS TO POLITICS THAT AFFECTED LAW AND COURTS: James Farley's history of the Roosevelt regime, from which excerpts are currently in *Collier's* magazine, will be out in book form in the fall, to the extent of more than 150,000 words. Farley reveals that he kept a diary, day-by-day, from the beginnings of his association with Franklin D. Roosevelt—a diary which goes into exhaustive details as to each day's appointments, conversations, developments, and their significance as appraised at the time. He also makes a precedent by stating that his articles were put in shape, from his diary, by a named "ghost writer", Walter Trohan, well-known Washington newspaperman. For good measure, he names also the men who wrote the many speeches he delivered. Another autumn publication will be the late Harry D. Hopkins' memoirs and documents. These are likely to reflect a different point of view from Farley's "taking the lid off". Together they may throw further light on what befell American law-making, Courts, labor organizations, and foreign policy.

THE RIGHT TO FLY: For July publication, Henry Holt and Company New York; (\$5.00) announce a book which is said to attempt to do for air power what Mohan did years ago for sea power. The author is John C. Cooper, who became a member of our Association in 1921 and was active in it for about fifteen

years, as Chairman of its Committee on Aeronautical Law and otherwise. He was born in Jacksonville, Florida in 1887, was graduated from Princeton, practised law there and became a specialist in aviation law, came up to New York as Vice President of American Airways, and became a member of the United States National Commission of the Permanent Aeronautical Commission. Forsaking active work in his profession, he is now back at Princeton, in its Institute of Advanced Study, for which he is at work on a monumental history of air law. His present volume treats in new fashion of air law and air power, against the background of global developments and peace treaties which he looks on as disregarding realities of geography and relative strength.

THE PSYCHOLOGY OF RUMOR: Gordon W. Allport and Leo Postman, well-known psychologists, have done a lot of original experiments and investigations into the anatomy of rumor, and they have produced a readable book for these uncertain times. Henry Holt and Company will publish it August 4. (\$3.50)



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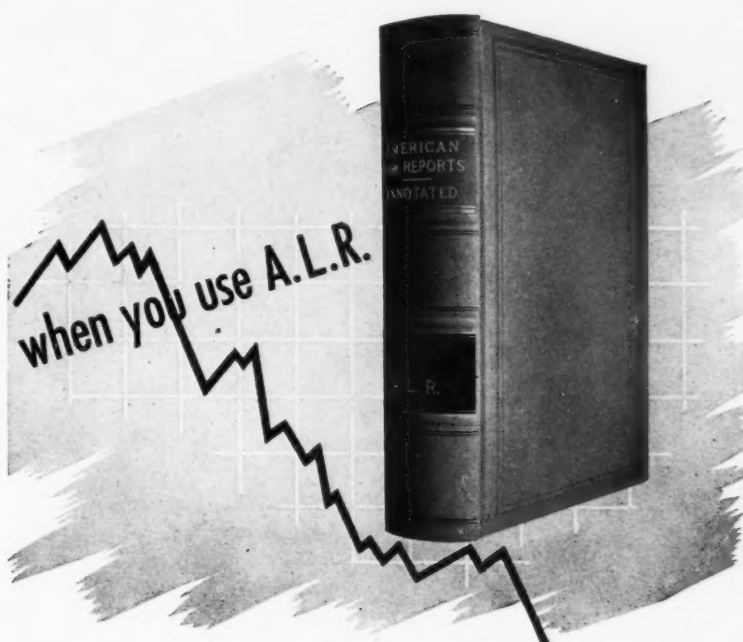
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